373 N.C.—No. 2 Pages 67-181

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY 17, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 1 NOVEMBER 2019

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No-merit brief—neglect and felony assault against another child—The termination of a mother's parental rights was affirmed where her counsel filed a no-merit brief and the termination was based on substance abuse and felony assault against another child. The termination order was based on clear, cogent, and convincing evidence supporting statutory grounds for termination. **In re T.H., 85.**

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SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9
February 4, 5, 6
March 4, 5, 6
April 8, 9, 10, 11
May 13, 14, 15
August 26, 27, 28, 29
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December 9, 10, 11

IN RE J.B.S.

[373 N.C. 67 (2019)]

IN THE MATTER OF J.B.S., M.C.S.

No. 232A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—abandonment and neglect

The trial court's termination of a father's parental rights for abandonment and willful neglect was affirmed where the father's counsel filed a no-merit brief. The trial court's order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 March 2019 by Judge Clifton H. Smith in District Court, Catawba County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephen M. Schoeberle for petitioner-appellee mother.

Richard Croutharmel for respondent-appellant father.

BEASLEY, Chief Justice

Respondent, the father of the minor children J.B.S. (John)[1] and M.C.S. (Mary), appeals from the trial court's 22 March 2019 order terminating his parental rights. Respondent's counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel in respondent's brief lack merit and affirm the trial court's order.

Respondent and petitioner, mother of John and Mary, married in 2002, separated in 2012, and subsequently divorced. Both John and Mary were born of the marriage. In May 2012, respondent and petitioner entered into a consent order by which petitioner obtained primary custody and control of both John and Mary.

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

On 25 October 2017, petitioner filed petitions to terminate respondent's parental rights on the grounds of neglect by abandonment and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2017). Petitioner alleged, *inter alia*, that although respondent was entitled to have visitation with both John and Mary, he rarely exercised those rights and that the last time respondent saw John and Mary was in June 2015. Petitioner further alleged that respondent failed to lend support and maintenance for John and Mary, withheld his presence, love, care, and affection from John and Mary for more than six consecutive months immediately preceding the petitions, and failed to send any birthday and Christmas cards or gifts for John and Mary within the last three years.

Following a hearing held before the Honorable Clifton Smith on 20 February 2019 in District Court, Catawba County, the trial court entered an order on 22 March 2019 terminating respondent's parental rights on both grounds alleged by petitioner. Respondent appeals.

Respondent's counsel has filed a no-merit brief on behalf of respondent pursuant to North Carolina Rule of Appellate Procedure 3.1(e). Counsel has advised respondent of his right to file *pro se* written arguments on his own behalf with this Court, and counsel has provided respondent with the documents necessary to do so. Respondent has not submitted any written arguments.

We independently review issues contained in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's counsel identified two issues that could arguably support an appeal but stated why he believed both of these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief and in light of our consideration of the entire record, we are satisfied that the trial court's 22 March 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights. *See* N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE J.E.

[373 N.C. 69 (2019)]

IN THE MATTER OF J.E.

No. 214A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and leaving child in placement

The termination of a mother's parental rights for neglect and for leaving her child in outside placement for twelve months without showing reasonable progress was affirmed where her counsel filed a no-merit brief and the order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 February 2019 by Judge Jimmy Myers in District Court, Davie County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee Davie County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey, for Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent, the mother of J.E. (Jason)[1], appeals from the trial court's 25 February 2019 order terminating her parental rights. Respondent's counsel has filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). We conclude that the issues identified by counsel in respondent's brief lack merit and affirm the trial court's order.

The Davie County Department of Social Services (DSS) has been involved with respondent and her family since November 2016. On 18 November 2016, DSS received a child protective services report that

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

Jason arrived at pre-school with a pill bottle containing twenty-four pills and labeled with respondent's name. Upon further assessment, respondent reported to a social worker that she had an addiction issue and most recently used cocaine on 17 November 2016 while supervising Jason. Respondent also reported that on 22 November 2016, she and her boyfriend were involved in a domestic altercation while Jason was present. On 28 November 2016, DSS obtained nonsecure custody of Jason and filed a petition alleging that Jason was a neglected and dependent juvenile. Following an adjudication hearing held on 6 February 2017, the trial court entered an order adjudicating Jason as a neglected and dependent juvenile.

On 10 October 2018, DSS filed a petition to terminate respondent's parental rights on the grounds of neglect and willfully leaving Jason in placement outside of the home for more than twelve months without showing reasonable progress to correct the conditions that led to his removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2017). Following hearings held on 7 January and 4 February 2019, the trial court entered an order on 25 February 2019 terminating respondent's parental rights on both grounds alleged by DSS. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent's counsel has filed a no-merit brief on behalf of respondent pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf with this Court, and counsel has provided respondent with the documents necessary to do so. Respondent has not submitted any written arguments.

We independently review issues contained in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's counsel identified two issues that could arguably support an appeal but stated why she believed both of these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the trial court's 25 February 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights. *See* N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE N.D.A.

[373 N.C. 71 (2019)]

IN THE MATTER OF N.D.A.

No. 184A19

Filed 1 November 2019

1. Termination of Parental Rights—notice of appeal—designation of appellate court—brief treated as writ of certiorari

The Supreme Court treated a father's brief as a certiorari petition and issued a writ of certiorari authorizing review of his challenges to the trial court's termination of his parental rights where the father noted his appeal from the trial court's order in a timely manner but erroneously designated the Court of Appeals as the judicial body to which the appeal would lie.

2. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—willfulness

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of willful abandonment where the trial court made no findings concerning the father's ability to visit his daughter, to contact his daughter's legal custodian, or to pay support during the relevant time period.

3. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—willfulness

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of neglect by abandonment where the trial court made no findings concerning the father's ability to contact his daughter's legal custodian, exercise visitation, or pay any support.

4. Termination of Parental Rights—impartiality of trial court—questioning of witnesses—clarification

The trial court's questioning of witnesses during a termination of parental rights hearing did not go beyond the need to clarify matters addressed during testimony and did not show bias against the father.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 18 March 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 4 October 2019 but determined on the record and briefs without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

ERVIN, Justice.

Respondent-father Mickey W. appeals from the trial court's order terminating his parental rights in his minor child, N.D.A.,[1] on the grounds of neglect and willful abandonment. Because we conclude that the findings in the trial court's order are insufficient to support the termination of respondent-father's parental rights on either of the grounds upon which the trial court's termination order rests, we vacate the trial court's termination order and remand this case to the District Court, Wilkes County, for further proceedings not inconsistent with this opinion.

Respondent-father is Nancy's biological father, while petitioner Heather S. is Nancy's legal custodian. In January 2014, Nancy and her biological mother, Heaven C., moved into petitioner's residence. At that time, the two adult women were involved in a romantic relationship. Nancy and her mother continued to live in petitioner's residence for the next year and a half.

In July 2015, the Wilkes County Department of Social Services began investigating a report arising from concerns about the mother's mental health, parenting skills, and failure to properly care for and supervise Nancy. At that time, Nancy was left in petitioner's care as part of a safety placement while DSS provided Nancy's mother with case management services. However, in December 2015, the mother told DSS that she was unable to properly care for Nancy. As a result, DSS filed a petition alleging that Nancy was a neglected and dependent juvenile. At the time that DSS filed this petition, respondent-father was incarcerated and had a projected release date of 4 December 2016.

After a hearing held on 1 February 2016, Judge David V. Byrd entered an order on 20 February 2016 finding Nancy to be a neglected and

1. N.D.A. will be referred to throughout the remainder of this opinion as "Nancy," which is a pseudonym used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

dependent juvenile, awarding legal and physical custody of Nancy to petitioner, and releasing DSS from any further responsibility relating to Nancy's care and supervision. In the 20 February 2016 order, Judge Byrd ordered that neither parent would be allowed to visit Nancy while incarcerated and that, in the event that either parent was not incarcerated, he or she was entitled to a minimum of one hour of supervised visitation with Nancy two times per month, with the necessary supervision to be provided by petitioner, a person or organization approved by petitioner, or personnel associated with "Our House."

Although respondent-father was released from incarceration in December 2016, he did not contact or visit Nancy following his release. In August 2018, petitioner contacted respondent-father, through social media, and the mother, by phone, for the purpose of requesting that they relinquish their parental rights in Nancy so that petitioner could adopt her. However, neither of Nancy's parents acceded to this request. Shortly thereafter, respondent-father was charged with and convicted of felonious breaking and entering. Respondent-father's current projected release date is July 2020.

On 14 August 2018, petitioner filed a petition seeking to have both parents' parental rights in Nancy terminated on the grounds of neglect and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1) and (7) (2017). After a hearing held on 27 February 2019, the trial court entered an order on 18 March 2019 finding that grounds existed to terminate respondent-father's and the mother's parental rights in Nancy based upon both of the grounds alleged in the petition and that the termination of both parents' parental rights in Nancy would be in the child's best interests. Respondent-father noted an appeal from the trial court's termination order to the Court of Appeals.

[1] As an initial matter, we note that, even though respondent-father noted his appeal from the trial court's order in a timely manner, he erroneously designated the Court of Appeals, rather than this Court, as the judicial body to which his appeal would lie. *See* N.C.G.S. §§ 7A-27(a)(5), 7B-1001(a1)(1); N.C. R. App. P. 3(d), 3.1(a). In spite of this deficiency in respondent-father's notice of appeal, petitioner has not sought the dismissal of respondent-father's appeal and respondent-father has not filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's termination order. In light of the seriousness of the issues involved in this termination of parental rights case, petitioner's failure to raise any issue arising from respondent-father's defective notice of appeal, and the fact that the appellate entries signed by the trial court correctly designate this Court as the body to which respondent-father's

appeal would lie, we elect to treat respondent-father's brief as a certiorari petition and issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits. *See* N.C. R. App. P. 21(a)(1) (stating that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action"); *see also In re Z.L.W.*, 831 S.E.2d 62, 65 (N.C. 2019) (stating that this Court granted the respondent-father's certiorari petition given that his notice of appeal improperly designated the Court of Appeals as the court to which his appeal from the trial court's order had been taken).

In seeking relief from the trial court's termination order before this Court, respondent-father contends that the trial court erred by terminating his parental rights in Nancy on the grounds that the trial court's findings of fact do not support the trial court's conclusion that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and willful abandonment. The relevant provisions of the North Carolina General Statutes establish a two-stage process for the termination of a parent's parental rights in a juvenile. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" that one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111 exist. N.C.G.S. § 7B-1109(e), (f). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 "in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law," *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)), with the trial court's conclusions of law being subject to de novo review on appeal. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

In its termination order, the trial court made the following findings of fact in support of its conclusion that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and willful abandonment:

> 8. The Father has had no contact with the Petitioner and has not participated in any visitation. He has been incarcerated since August 2018. The Father has a significant criminal record dating back to 1999.
>
> 9. The Father has had no contact with the minor child in four years. He testified that he attempted to set up visits with the child but could not get any assistance in doing so.
>
> 10. The Father has had significant problems with substance abuse for many years.
>
> . . . .
>
> 13. Neither [parent] has ever provided financial support for the minor child.
>
> 14. Neither [parent] has ever sent any cards, gifts, or usual and customary tokens of affection to the minor child.
>
> 15. The child has been neglected by the [parents] as that term is defined in Chapter 7B of the General Statutes. The [parents] have not provided any type of support or care for the child. Their actions reflect an indifference to the welfare and well-being of the child.
>
> 16. The [parents] willfully abandoned the child as that term is defined by N.C.G.S. § 7B-1111(a)(7) for the six months immediately preceding the filing of the petition in this matter.

As an initial matter, respondent-father contends that a number of the trial court's findings of fact are legally defective. More specifically, respondent-father asserts that the second sentence contained in Finding of Fact No. 9 consists of nothing more than a mere recitation of his own testimony and is not, for that reason, a valid finding of fact. We agree with the Court of Appeals that "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge." *Moore v. Moore*, 160 N.C. App. 569, 571–72, 587 S.E.2d 74, 75 (2003) (citation omitted). By stating that respondent-father had testified that he had "attempted to set up visits with the child but could not get any assistance in doing so," the trial court failed to indicate whether it deemed the relevant portion of respondent-father's testimony credible. As a result, we are compelled to disregard the second sentence contained in Finding of Fact No. 9 in evaluating the validity of the trial court's termination order.

In addition, respondent-father contends that Finding of Fact No. 10 lacked sufficient evidentiary support on the grounds that "[n]o one testified that he suffered from substance abuse." However, respondent-father testified that he has "had a substance abuse problem"; that he "slip[ped] and got back on drugs" after the death of his mother in February 2018; that, when petitioner contacted him in August 2018, he "was trying to get [his] life away from that and be a part of [Nancy's] life"; and that he had last used any illegal substance around the time of his arrest in August 2018. In addition, respondent-father testified that he was incarcerated at the time of the termination hearing as the result of his drug use. As a result, the trial court did not err by finding that respondent-father had "had significant problems with substance abuse for many years."

Although respondent-father acknowledges that the record supports the trial court's statement in Finding of Fact No. 14 that "[n]either [parent] has ever sent any cards, gifts, or usual and customary tokens of affection to the minor child," he attempts to explain his failure to send such items to the child by pointing to his testimony that he did not know petitioner's address and that he did not want to get into trouble by reaching out to her directly. In view of his concession that the record supports the contents of Finding of Fact No. 14, that finding is presumed to rest upon competent evidence and is, for that reason, binding for purposes of appellate review. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal" (citation omitted)).

Finally, respondent-father contends that Finding of Fact Nos. 15 and 16, which consist of determinations that the parents' parental rights in the child were subject to termination on the grounds of neglect and abandonment, constitute conclusions of law rather than findings of fact given that they involve the exercise of judgment or the application of legal principles. As the Supreme Court of the United States has stated, an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact" and should "be distinguished from the findings of primary, evidentiary, or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (stating that "[u]ltimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts" (citation omitted)). Regardless of whether statements like those contained in Finding of Fact Nos. 15 and 16 are classified as findings of ultimate facts

or conclusions of law, that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings. *See In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (stating that "a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent" (citation omitted)). As a result, our analysis of respondent-father's challenge to the validity of Finding of Fact Nos. 15 and 16 will be addressed in the course of our analysis of the lawfulness of the trial court's determinations concerning the extent to which respondent-father's parental rights in Nancy were subject to termination on the basis of neglect and abandonment.

[2] Next, respondent-father contends that the trial court erred by determining that his parental rights in Nancy were subject to termination on the grounds of willful abandonment. A parent's parental rights in a child are subject to termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). The Court of Appeals has held that, "[w]hether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986) (citation omitted). We agree with the Court of Appeals that, "[a]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re D.E.M.*, 810 S.E.2d 375, 378 (N.C. Ct. App. 2018) (citation omitted).

In attempting to persuade us that the trial court erred in determining that his parental rights in Nancy were subject to termination on the basis of willful abandonment, respondent-father argues that the trial court failed to address the willfulness of his conduct in spite of the fact that his failure to visit with Nancy and to take the other actions mentioned in the trial court's findings was not willful. In support of this contention,

respondent-father points to his testimony that he attempted to contact Our House, DSS, and the office of the Clerk of Superior Court fifteen times over a period of a year and a half for the purpose of obtaining the ability to visit Nancy without success. According to respondent-father, the trial court failed to make any findings concerning the efforts that he made to visit with his daughter and that, had the trial court made factual findings consistently with his testimony, it would have been unable to find that he willfully abandoned Nancy. On the other hand, petitioner contends that the trial court was free to disbelieve respondent-father's testimony concerning his efforts to visit with Nancy and argues that respondent-father's conduct demonstrates that he was completely indifferent to Nancy's well-being.

After careful examination of the trial court's findings of fact, the Court is persuaded that these findings are insufficient to support a determination that respondent-father willfully abandoned Nancy. *See In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007); *see also D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861 (stating that, "[b]ecause 'wilful intent is an integral part of abandonment' " and because willfulness " 'is a question of fact to be determined from the evidence[,]' a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent." (internal citation omitted)). Although the trial court found that respondent-father had not had any contact with petitioner or Nancy, had not visited with Nancy, had not provided any financial support for Nancy, and had not sent any cards, gifts, or tokens of affection to Nancy, the trial court's findings fail to adequately address the extent to which respondent-father's acts or omissions were willful in spite of the fact that respondent-father's unchallenged testimony tended to show that he had unsuccessfully attempted to work out arrangements under which he could visit with Nancy on multiple occasions following his release from incarceration in December 2016, with these efforts including making contact with Our House, DSS, and the office of the Clerk of Superior Court on at least fifteen occasions between December 2016 and May 2018. In view of the fact that the termination petition was filed in August 2018, respondent-father's testimony suggests that his attempts to make arrangements to visit with Nancy occurred during the relevant six months immediately preceding the filing of the petition. Although petitioner is certainly correct in noting that the trial court was free to disbelieve respondent-father's testimony, *see Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994), the trial court's findings with respect to the willfulness issue consisted of nothing more than a recitation of the relevant portion of respondent-father's testimony without making any determination as to whether the relevant portion of respondent-father's testimony was credible.

In addition, respondent-father testified that he had no relationship with petitioner sufficient to persuade him that he had the ability to contact her directly, that he believed that he was not permitted do so, and that, even though he knew that petitioner lived in his community, he did not know her address and could not send Nancy any cards, letters, or gifts for that reason. As was the case with respect to the issue of visitation, the trial court's findings make no mention of the issue of whether respondent-father had the ability to contact Nancy or petitioner during the relevant six-month period. Similarly, the trial court failed to make any findings concerning the extent to which respondent-father had the ability to pay financial support for Nancy during the relevant six-month period even though it found that respondent-father had willfully failed to make such payments. *See Pratt*, 257 N.C. at 501–02, 126 S.E.2d at 608 (stating that "a mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment" given that "[e]xplanations could be made which would be inconsistent with a wilful intent to abandon"). Thus, given the absence of any findings of fact concerning respondent-father's ability to visit with Nancy, to contact petitioner or his daughter, or to pay support during the relevant time period, the trial court's findings do not "demonstrate that [respondent] had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [Nancy].' " *In re D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861-62 (citation omitted). As a result, while we express no opinion concerning the issue of whether the record contains sufficient evidence to support a finding that respondent-father willfully abandoned Nancy, the trial court's evidentiary findings fail to support its ultimate determination that respondent-father willfully abandoned Nancy for a period of at least six consecutive months immediately preceding the filing of the termination petition in accordance with N.C.G.S. § 7B-1111(a)(7).

[3] Additionally, respondent-father argues that the trial court erred by finding that his parental rights in Nancy were subject to termination on the grounds of neglect because it failed to make certain required findings of fact and because the findings of fact that the trial court did make do not support its determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect. According to N.C.G.S. § 7B-1111(a)(1), a trial court has the authority to terminate a parent's parental rights in a child in the event that the parent has neglected the child as that term is defined in N.C.G.S. § 7B-101, which provides that a neglected juvenile is, among other things, a juvenile who "does not [receive] proper care, supervision, or discipline from

the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned." N.C.G.S. § 7B-101(15). The Court of Appeals held that, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis omitted)). In the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " *Id.* (citation omitted). In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citation omitted).

In his initial challenge to the trial court's determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect, respondent-father argues that the trial court failed to make a finding regarding the likelihood of future neglect and that the record fails to contain sufficient evidence to support any such finding had one been made. According to respondent-father, the underlying adjudication of neglect rested upon the mother's mental health difficulties rather than upon any act or omission by respondent-father, with the record containing no evidence tending to show that respondent-father was likely to neglect Nancy in the event that she was to be placed in his care in the future. Petitioner, on the other hand, argues that the trial court was not required to make findings concerning the likelihood of future neglect in this case because the trial court did not rely on the previous neglect adjudication in determining that respondent-father had neglected Nancy. According to petitioner, the trial court's findings relate to respondent-father's treatment of Nancy after she was placed in petitioner's custody in February 2016, so that the trial court's finding of neglect rested upon current neglect rather than a combination of past neglect coupled with a likelihood of repeated neglect in the future.

A careful analysis of the trial court's termination order reveals that it contains few, if any, findings that appear to assume the applicability of the two-step method of analysis employed in cases involving past neglect and a likelihood of future neglect. For example, the trial court did not find that Nancy had previously been adjudicated to be a neglected

juvenile or that there was a likelihood that she would be neglected in the future in the event that she was to be placed in respondent-father's care. Instead, as petitioner suggests, it appears the trial court's finding of neglect was based upon a determination that respondent-father was currently neglecting Nancy, with this determination resting upon respondent-father's lack of contact with Nancy and his current lack of involvement in Nancy's life. More specifically, the trial court's determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect seems to have hinged upon evidentiary findings that respondent-father had failed to: (1) visit with Nancy; (2) contact petitioner or Nancy; (3) provide any financial support for Nancy; and (4) send any cards, gifts, or tokens of affection to Nancy.

A trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. We agree with the Court of Appeals that, "in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing." *In re C.K.C.*, 822 S.E.2d 741, 745 (N.C. Ct. App. 2018) (citation omitted). As we have previously discussed in connection with our analysis of the validity of the trial court's decision that respondent-father's parental rights in Nancy were subject to termination on the grounds of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7), the trial court's findings fail to adequately address the issue of the willfulness of respondent-father's conduct.[2] Unlike abandonment as a ground for termination under N.C.G.S. § 7B-1111(a)(7), the relevant time period for a finding of neglect by abandonment is not limited to the six consecutive months immediately preceding the filing of the termination petition. *See In re Humphrey*, 156 N.C. App. 533, 541, 577 S.E.2d 421, 427 (2003). Therefore, a trial court may consider a parent's conduct over the course of a more extended period of time in determining whether

2. Although the word "willful" does not appear in the statutory definition of neglect by abandonment, N.C.G.S. § 7B-101(15), this Court has suggested that abandonment is inherently a willful act. *See Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (stating that "abandonment imports any wilful or intentional conduct on the part of the parent" and that "[w]ilful intent is an integral part of abandonment").

the parent in question has neglected his or her child by abandonment. *See Id.*

In its termination order, the trial court found that respondent-father had not had any contact with Nancy since at least 2015. On the other hand, the record reflects that respondent-father was incarcerated at the time that DSS began its investigation relating to Nancy in 2015, remained incarcerated at the time that Nancy was adjudicated to be a neglected and dependent juvenile in February 2016, and remained incarcerated through December 2016. Although "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision[,]" *In re T.N.H.*, 372 N.C. at 412, 831 S.E.2d at 62 (citation omitted), the trial court failed to make any findings of fact regarding whether respondent-father had the ability to contact petitioner and Nancy while he was incarcerated, with such findings being necessary in order for the trial court to make a valid determination regarding the extent to which respondent-father's failure to contact Nancy and petitioner from 2014 through December 2016 was willful. *See In re D.M.O.*, 250 N.C. App. at 575, 794 S.E.2d at 862 (stating that "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child"). In addition, the record reflects that, even though the initial adjudication order granted the parents a minimum of one hour of supervised visitation twice per month, that order also provided that neither parent was entitled to visit with Nancy while he or she was incarcerated. Simply put, the trial court failed to make any findings of fact relating to the issue of the extent, if any, to which respondent-father's incarceration affected his ability to visit with or otherwise contact Nancy.

As a result, even though the trial court's failure to make a finding concerning the likelihood that respondent-father would neglect Nancy in the event that she was placed in his care did not constitute error in light of the legal theory upon which the trial court's finding of neglect was based, the trial court's findings of fact did not adequately support a determination that respondent-father's parental rights in Nancy were subject to termination based upon neglect by abandonment given the absence of any findings concerning respondent-father's ability to contact petitioner or Nancy, to exercise visitation, or to pay any support in order to determine that his abandonment was willful. Although we again refrain from expressing any opinion concerning the extent, if any, to which the record evidence would support a finding that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect by abandonment, we hold that the trial

court's findings of fact fail to adequately support its determination that respondent-father's parental rights in Nancy were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1).

[4] Finally, respondent-father contends that the trial court erred by failing to act impartially during the termination hearing, with this lack of impartiality being demonstrated by trial court's decision to question various witnesses during the hearing in a manner that went beyond the need to ensure that the record was clear. According to respondent-father, the trial court's actions had the effect of relieving petitioner of her need to satisfy the applicable burden of proof "by asking questions that the petitioner failed to ask during its principal questioning of the witnesses." Petitioner, on the other hand, contends that respondent-father received a fair hearing and that the manner in which the trial court questioned various witnesses did not demonstrate the existence of bias in favor of petitioner and against respondent-father. On the contrary, petitioner argues that the questions that the trial court posed during the termination hearing simply clarified the record and that respondent-father has failed to point to any question that showed the existence of any bias on the part of the trial court.

A trial court "may interrogate witnesses, whether called by itself or by a party." N.C. R. Evid. 614(b). As this Court has previously stated, "it is proper for the judge to propound competent questions to a witness [during a trial] in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked." *State v. Smith*, 240 N.C. 99, 102, 81 S.E.2d 263, 265–66 (1954) (citations omitted). Respondent-father has failed to direct our attention to any specific question or questions that the trial court posed during the hearing that, in respondent-father's opinion, tended to show the existence of bias on the part of the trial court. Instead, respondent-father's argument rests upon the frequency with which the trial court posed questions to various witnesses and a contention that the questions that the trial court posed had the effect of helping petitioner to satisfy the applicable burden of proof. We do not find respondent-father's argument to be persuasive.

At the termination hearing, the trial court questioned petitioner about her work schedule, her reason for contacting respondent through social media instead of by phone, and the nature and extent of respondent-father's contacts with her. Similarly, during respondent-father's testimony, the trial court asked several questions in an attempt to clarify issues such as the number of times that respondent-father had contacted Our House, the dates upon which respondent-father had been incarcerated, the length of time during which respondent-father had

been incarcerated, and the date upon which respondent-father's mother had died. Each of these matters was relevant to a proper determination of the issues that were before the trial court in this case. As a result, we conclude that the trial court's questioning of witnesses during the termination hearing did not go beyond that needed to clarify matters addressed during the testimony of the parties and that the questions that the trial court posed during the termination hearing did not, for that reason, tend to show that the trial court was in any way biased against respondent-father.

Thus, for the reasons set forth above, we hold that the trial court's findings of fact are insufficient to support its determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and abandonment and that the trial court did not fail to act impartially during the termination hearing. As a result, we vacate the trial court's termination order and remand this case to the District Court, Wilkes County, for further proceedings not inconsistent with this opinion, including, the entry of a new order containing proper findings and conclusions addressing the issue of whether grounds exist to support the termination of respondent-father's parental rights in Nancy. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3 (2007).

VACATED AND REMANDED.

IN RE T.H.

[373 N.C. 85 (2019)]

IN THE MATTER OF T.H.

No. 151A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and felony assault against another child

The termination of a mother's parental rights was affirmed where her counsel filed a no-merit brief and the termination was based on substance abuse and felony assault against another child. The termination order was based on clear, cogent, and convincing evidence supporting statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 February 2019 by Judge Joseph Moody Buckner in District Court, Orange County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming for petitioner-appellee Orange County Department of Social Services.

Schell Bray PLLC, by Christina Freeman Pearsall, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant mother.

HUDSON, Justice.

Respondent, the mother of the minor child T.H. (Tommy),[1] appeals from the trial court's 12 February 2019 order terminating her parental rights. Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e)of the North Carolina Rules of Appellate Procedure. We conclude that the issues raised by counsel in respondent's brief are meritless and affirm the trial court's order.

On 8 February 2018, the Orange County Department of Social Services (DSS) filed a petition alleging that one-month-old Tommy was

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

a neglected juvenile. DSS had received a child protective services referral after Tommy tested positive for marijuana at birth. Respondent was also on probation after entering an *Alford* plea to felony negligent child abuse – for serious physical injuries sustained by her first child,[2] who was Tommy's brother. On 19 April 2018, DSS filed an amended petition alleging that Tommy was neglected and dependent. The amended petition changed the identification of Tommy's father[3] and added allegations that, shortly after the filing of the first petition, respondent entered into a consent order with DSS that was intended to ensure Tommy's safety and then violated that order.

The trial court entered an order adjudicating Tommy as a neglected and dependent juvenile on 16 July 2018. The trial court also relieved DSS of its obligation to engage in reunification efforts. On 11 October 2018, DSS filed a motion in the cause to terminate respondent's parental rights to Tommy on the grounds of neglect, dependency, and committing a felony assault that resulted in serious bodily injury to another child of the parent. *See* N.C.G.S. § 7B-1111(a)(1), (6), (8) (2017). A termination of parental rights hearing was held on 17 January 2019, and on 12 February 2019 the trial court entered an order terminating respondent's parental rights on the grounds of neglect and committing a felony assault that resulted in serious bodily injury to another child of the parent. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Counsel for respondent has filed a no-merit brief on her behalf pursuant to N.C.R. App. P. 3.1(e). Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted any written arguments to this Court.

We independently review issues identified by respondent's counsel in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's attorney filed a twenty-five-page brief in which she identified two issues that could arguably support an appeal but also stated why she believed both of these issues lacked merit. Having carefully considered the issues identified in the no-merit brief in light of the entire record, we conclude that the trial court's 12 February 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights.

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2. Respondent relinquished her rights to this child.

3. Tommy's father relinquished his parental rights and is not a party to this appeal.

See N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF Z.O.M., K.A.M.

No. 152A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and willful failure to make reasonable progress

The termination of a mother's parental rights was affirmed where the mother had a history of substance abuse and her counsel filed a no-merit brief. The termination order was based on clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 24 January 2019 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

Nelson Mullins Riley & Scarborough, LLP, by Chelsea K. Barnes, for appellee Guardian ad Litem.

Rebekah W. Davis for respondent-appellant mother.

NEWBY, Justice.

Respondent, the mother of minor children Z.O.M. (Zeke) and K.A.M. (Kari),[1] appeals from the trial court's 24 January 2019 order terminating

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

her parental rights. Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues raised by counsel in respondent's brief are meritless and therefore affirm the trial court's order.

On 9 October 2017, New Hanover County Department of Social Services (DSS) filed a petition alleging that Zeke and Kari were neglected juveniles. In support of this allegation, DSS explained that respondent had a history of substance abuse and had overdosed on heroin a few days earlier and that the father had assaulted respondent with a baseball bat and tested positive for several illegal drugs. The trial court entered an order adjudicating Zeke and Kari as neglected juveniles on 7 December 2017.

On 24 October 2018, the trial court entered a permanency planning order that established a permanent plan of adoption with a concurrent plan of reunification. The court ordered DSS to file a termination of parental rights petition within sixty days. On 30 October 2018, DSS filed the petition, which sought to terminate respondent's parental rights to Zeke and Kari on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2017). A termination of parental rights hearing was held on 7 January 2019, and the trial court entered an order on 24 January 2019 terminating respondent's parental rights based on both grounds alleged in DSS's termination petition. Respondent appealed.[2]

Counsel has filed a no-merit brief on respondent's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In this twenty-five page brief, counsel for respondent identified two issues that could arguably support an appeal but also stated why she believed both of these issues lacked merit. Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted any written arguments to this Court.

We independently review issues identified by respondent's counsel in a no-merit brief filed under Rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). We have carefully reviewed the issues identified in the no-merit brief in light of the entire record. We are satisfied that the trial court's 24 January 2019 order was supported by clear, cogent, and

2. Zeke and Kari's father did not appeal the trial court's order and is not a party to this appeal.

convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

INTERSAL, INC.
v.
SUSI H. HAMILTON, Secretary, North Carolina Department of Natural and Cultural Resources, in her official capacity; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA; and FRIENDS OF QUEEN ANNE'S REVENGE, a Nonprofit Corporation

No. 115PA18

Filed 1 November 2019

1. Contracts—novation—effect on earlier contract—plain wording

By its plain wording, a 2013 settlement agreement was a novation of a 1998 agreement regarding eighteenth-century ships uncovered off the coast of North Carolina, and plaintiff's breach of contract claims arising from the 1998 agreement were extinguished.

2. Contracts—tortious interference—elements—intentional inducement

The Supreme Court affirmed the trial court's dismissal of plaintiff marine research company's tortious interference with contract claim against defendant nonprofit under plaintiff's contracts with the N.C. Department of Natural and Cultural Resources (DNCR) concerning media rights connected to the recovery of the pirate Blackbeard's flagship. Plaintiff failed to allege that defendant nonprofit intentionally induced DNCR not to perform on its contract with plaintiff.

3. Contracts—breach—common law—subject matter jurisdiction—exhaustion of administrative remedies

Where plaintiff marine research company sued the N.C. Department of Natural and Cultural Resources (DNCR) for breach of contract by violating plaintiff's media rights connected to the recovery of the pirate Blackbeard's flagship, the trial court erred by dismissing the claim for lack of subject matter jurisdiction. Plaintiff's claim was a common law breach of contract claim, and defendants failed to demonstrate that plaintiff was required

to exhaust administrative remedies before bringing a claim in superior court.

4. Collateral Estoppel and Res Judicata—breach of contract claim—previous order—not raised in pleadings

The trial court erred by dismissing plaintiff's breach of contract claim based upon its conclusion that the claim was barred by a previous order under the doctrine of res judicata. The previous order was not a final judgment on the merits of plaintiff's breach of contract claim because that claim is a separate cause of action which plaintiff's pleadings did not raise in those proceedings.

Justice MORGAN concurring in part and dissenting in part.

Justice ERVIN joins in this separate opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered on 13 October 2017 dismissing plaintiff's second amended complaint and an order entered on 4 May 2018 granting defendants' motion to dismiss plaintiff's appeal, both by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice under N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 15 May 2019 in session in the New Bern City Hall in the City of New Bern pursuant to section 18B.8 of Session Law 2017-57.

Linck Harris Law Group, PLLC, by David H. Harris Jr., for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Ryan Y. Park, Deputy Solicitor General, Brian D. Rabinovitz, Special Deputy Attorney General, and Kenzie M. Rakes, Assistant Solicitor General, for defendant-appellees Susi H. Hamilton, North Carolina Department of Natural and Cultural Resources, and State of North Carolina.

Hedrick Gardner Kincheloe & Garofalo LLP, by Joshua D. Neighbors, for defendant-appellee Friends of Queen Anne's Revenge.

HUDSON, Justice.

This case is before us pursuant to plaintiff's petition for writ of certiorari seeking review of the trial court's 13 October 2017 opinion and order dismissing plaintiff's second amended complaint. We allowed plaintiff's petition for writ of certiorari on 5 December 2018 and we now review whether "the trial court err[ed] in dismissing any or all of Plaintiff's claims for relief and Plaintiff's Second Amended Complaint under N.C. R. Civ. P. 12(b)(1), (2), (6), or other reasons stated in the order." Accordingly, we affirm in part, reverse in part, and remand to the trial court because we conclude that it: (1) correctly granted the State Defendants'[1] motion to dismiss plaintiff's claims for breach of the 1998 Agreement; (2) correctly granted the motion filed by Friends of the Queen Anne's Revenge (FoQAR) to dismiss plaintiff's tortious interference with contract claim; (3) erred in granting the State Defendants' motion to dismiss plaintiff's claim that the State Defendants breached the 2013 Settlement Agreement by violating plaintiff's media and promotional rights; and (4) erred in granting the State Defendants' motion to dismiss plaintiff's claim that DNCR breached the 2013 Settlement Agreement by failing to renew plaintiff's *El Salvador* search permit.

Factual and Procedural Background

The facts of this case begin with, and are now woven into, the tales of two ships (1) *Queen Anne's Revenge* (*QAR*) and (2) *El Salvador*.[2] *QAR* is believed to be the flagship of pirate Blackbeard and was reported lost in 1718. *El Salvador* was a privately owned merchant vessel that was reported lost at sea, off the coast near Cape Lookout, North Carolina, during a storm in 1750.

In 1994, centuries after the disappearances of these two ships, plaintiff Intersal, Inc., a marine research and recovery corporation, received permits from the North Carolina Department of Natural and Cultural Resources (DNCR) to search for *QAR* and *El Salvador* in Beaufort Inlet

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1. This opinion will—as the trial court did below—use the name "the State Defendants" to refer collectively to defendants (1) Susi H. Hamilton, Secretary of the North Carolina Department of Natural and Cultural Resources; (2) the North Carolina Department of Natural and Cultural Resources (DNCR); and (3) the State of North Carolina.

2. This factual background is a summary of the allegations contained in plaintiff's second amended complaint. When reviewing a trial court's decision on a motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6), we treat the allegations contained in the complaint as true. *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

in Carteret County. On 21 November 1996, plaintiff discovered *QAR* just over a mile off Bogue Banks.

After discovering *QAR*, plaintiff entered into an agreement with DNCR on 1 September 1998 (1998 Agreement). As part of the agreement, plaintiff agreed to forgo its entitlement to any share in "coins and precious metals" recovered from *QAR*. The ultimate disposition of all artifacts from *QAR* was a matter left to DNCR.

In return for plaintiff forgoing its rights to the artifacts from *QAR*, DNCR recognized plaintiff as a partner in all aspects of the "*QAR* Project." The 1998 Agreement defined the *QAR* Project as "all survey, documentation, recovery, preservation, conservation, interpretation and exhibition activities related to any portion of the shipwreck of QAR or its artifacts." Accordingly, plaintiff also obtained the following rights: (1) "the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties"; (2) the reasonable cooperation of "[a]ll Parties . . . in the making of a film and/or video documentary . . . with regard to project activities"; (3) "reasonable access and usage, subject to actual costs of duplication, of all video and/or film footage generated in the making" of "a non commercial educational video and/or documentary" that "[a]ll Parties agree[d] to cooperate in [ ] making"; and (4) "exclusive rights to make (or have made) molds or otherwise reproduce (or have reproduced) any QAR artifacts of its choosing for the purpose of marketing exact or miniature replicas" subject to "standard museum practices," approval by the project's "Advisory Committee," and the requirement that the replicas "be made on a limited edition basis" and authenticated by individual numbering or some other means.

In addition, the 1998 Agreement provided that:

> Subject to the provisions of Article 3 of Chapter 121 of the General Statues of North Carolina and subchapter .04R of Title 7 of the North Carolina Administrative Code, [DNCR] agrees to recognize [plaintiff's] . . . efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of [plaintiff's] permits for [ ] *El Salvador* . . . for the life of this Agreement, renewal of said permits cannot be denied without just cause.

Plaintiff alleges that in 2013, DNCR breached the 1998 Agreement in a number of ways. First, plaintiff alleges that DNCR failed to recognize plaintiff's renewal of the 1998 Agreement. Plaintiff alleges that it validly

executed its option to renew the 1998 Agreement via letters sent on 28 October 2012 and 4 December 2012.

Second, plaintiff alleges that certain DNCR employees, who had the responsibility of overseeing the *QAR* Project, violated the 1998 Agreement's conflict of interest provisions—and its provisions granting plaintiff exclusive commercial media rights—by serving on the board of the nonprofit corporation FoQAR. Specifically, plaintiff alleges that the DNCR employees, serving in their roles as board members of FoQAR, contracted with an independent media company to produce videos and a website covering the *QAR* Project. Allegedly, the execution of this contract included a ten thousand dollar payment from FoQAR to the spouse of FoQAR's treasurer, and that payment was not reported on FoQAR's 2013 Form 990. FoQAR's treasurer was also a DNCR employee who oversaw the *QAR* Project. Plaintiff alleges that these actions also constituted tortious interference with contract by FoQAR. FoQAR filed Articles of Dissolution on 14 March 2016. However, this action continues under N.C.G.S. § 55A-14-06(b)(5) (2017).

Third, plaintiff alleges that DNCR breached the 1998 Agreement by obstructing and delaying the renewal of plaintiff's permit, which authorized it to search for *El Salvador*. Plaintiff also alleges that this obstruction of renewal of its permit implicates the 1998 Agreement's conflict of interest provisions because the DNCR employees who obstructed and delayed the renewal of its permit were also board members of FoQAR.

On 26 July 2013, plaintiff filed a petition for a contested case hearing with the Office of Administrative Hearings (the OAH) seeking a remedy for State Defendant's alleged violations of the 1998 Agreement and of plaintiff's intellectual property rights. Following that filing, plaintiff's *El Salvador* permit was renewed on 9 August 2013. Thereafter, the OAH ordered mediation in the matter and, as a result of the mediation, plaintiff, DNCR, and plaintiff's long-time "*QAR* Video Designee," Nautilus Productions, LLC (Nautilus), entered into a settlement agreement on 15 October 2013 (2013 Settlement Agreement).

The parties expressly agreed that the 2013 Settlement Agreement would supersede the 1998 Agreement. Further, plaintiff and DNCR agreed to release each other from all claims that they could have asserted under the 1998 Agreement. Plaintiff also agreed to withdraw its petition for a contested case hearing within five business days of the execution of the agreement. Moreover, the agreement stated that, in the event of breach, the parties could "avail themselves of all remedies provided by law or equity."

Under the 2013 Settlement Agreement, the parties agreed that DNCR would "establish and maintain access to a website for the issuance of Media and Access Passes to *QAR*-project related artifacts and activities." The website would include, in pertinent part: (1) plaintiff's terms of use agreement, and (2) links to the websites of DNCR, plaintiff, and Nautilus. Further, the parties agreed that, regardless of the entity that produced the media,

> [a]ll non-commercial digital media . . . shall bear a time code stamp, and watermark (or bug) of Nautilus and/or D[N]CR, as well as a link to D[N]CR, [plaintiff], and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.

Moreover, DNCR agreed "to display non-commercial digital media only on D[N]CR's website."

Further, with regard to plaintiff's *El Salvador* permit, the 2013 Settlement Agreement provided that:

> In consideration for [plaintiff's] significant contributions toward the discovery of the QAR and continued cooperation and participation in the recovery, conservation, and promotion of the QAR, D[N]CR agrees to continue to issue to [plaintiff] an exploration and recovery permit for the shipwreck *El Salvador* in the search area defined in the current permit dated 9 August 2013. D[N]CR agrees to continue to issue the permit through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. . . . D[N]CR agrees to recognize [plaintiff's] efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of [plaintiff's] permit for the *El Salvador*.

Plaintiff alleges that DNCR later breached the 2013 Settlement Agreement by: (1) displaying over two thousand *QAR* digital media images and over two hundred minutes of *QAR* digital media video on websites other than DNCR's website; (2) displaying those images without a watermark, time code stamp, or website links; (3) continuing to obstruct and delay the renewal of plaintiff's permit to search for *El Salvador*; (4) failing to implement certain mandates of the 2013 Settlement Agreement, such as changes to the *QAR* Project media policy; (5) failing to properly inform certain groups of opportunities under

the collaborative commercial narrative opportunity and/or media procedure language of the 2013 Settlement Agreement; (6) allowing FoQAR to film *QAR* recovery operations through an independent media company; (7) allowing FoQAR to post the footage that it filmed on the FoQAR Facebook page without a time code stamp, watermark, or website link; and (8) allowing FoQAR to bring the crew of a local radio show to dive the *QAR* shipwreck and shoot footage aboard the recovery vessel. Plaintiff also contends that FoQAR tortiously interfered with plaintiff's contract rights by filming the *QAR* recovery efforts and placing the footage on its website, while FoQAR was aware of the 2013 Settlement Agreement.

On 2 March 2015, plaintiff filed a second petition for a contested case hearing with the OAH. DNCR moved to dismiss plaintiff's petition, arguing that the OAH lacked subject matter jurisdiction to hear contractual claims that were not raised in plaintiff's earlier contested case hearing petition. Plaintiff dismissed its second petition for a contested case hearing without prejudice on 26 May 2015.

On 3 November 2015, plaintiff received a notice of termination for its permit to search for the *El Salvador* even though it already requested renewal of the permit. However, on 5 November 2015, plaintiff received another notice from the Attorney General's Office stating that DNCR had received plaintiff's request for renewal of the permit, that the notice of termination was rescinded, and that it would take thirty days to review plaintiff's renewal request. In those thirty days, State Defendants, for the first time, solicited an opinion from counsel for the Kingdom of Spain as to whether State Defendants could issue a permit to search for *El Salvador*. On 30 November 2015, counsel for the Kingdom of Spain issued an opinion that State Defendants could not grant a permit to search for *El Salvador* without the Kingdom of Spain's permission. Plaintiff received notice that its request for review of the *El Salvador* permit was denied. The notice stated that plaintiff's permit was being terminated because (1) plaintiff "failed to demonstrate operational control of laboratory activities and failed to meet certain reporting requirements"; and (2) the issuance of further permits was "not deemed to be in the best interest of the State" because "Spain's assertion of its ownership interest in *El Salvador* requires careful consideration of the State's legal authority to issue a permit in this situation." Plaintiff alleges that *El Salvador* was a private merchant vessel and, therefore, the Kingdom of Spain has no legitimate claim to it.

Plaintiff sought review of the decision to terminate its permit, and on 21 January 2016, DNCR issued a final agency decision upholding the

denial of the *El Salvador* permit. Thereafter, plaintiff filed a petition for a contested case with the OAH seeking review of DNCR's final agency decision. Plaintiff's contested case was dismissed on 27 May 2016. Plaintiff then sought review in Superior Court, Wake County.

On 27 July 2015, plaintiff separately filed a complaint in Superior Court, Wake County, asserting claims against the State Defendants for breach of contract, and requesting that the trial court enter a declaratory judgment, a temporary restraining order, a preliminary injunction, and a permanent injunction. The case was designated a mandatory complex business case on 10 September 2015. However, on 4 May 2016, this case was stayed by the trial court pending the resolution of plaintiff's administrative appeal.

With regard to plaintiff's administrative appeal, plaintiff filed its petition for judicial review of the OAH's decision to dismiss its contested case on 23 June 2016. Pursuant to judicial review, the trial court entered an order upholding the OAH decision, granting summary judgment in favor of the State Defendants, and denying and dismissing plaintiff's petition for judicial review because

> the Kingdom of Spain has a sufficient likelihood of success in its claim of ownership of the consigned cargo of the *El Salvador*, and that a reasonably cautious and prudent steward of the State's resources, in a good faith exercise of discretion, could conclude that the issuance of the [*El Salvador*] permit to the Petitioner was no longer in the best interest of the State.

Following its first order, the trial court granted plaintiff's motion for leave of court to file a second amended complaint on 20 February 2017. Plaintiff's second amended complaint was also deemed to be filed on that date. In the second amended complaint, plaintiff asserted the following pertinent claims: (1) breach of contract claims against the State Defendants for violating the terms of the 1998 Agreement, for violating plaintiff's media and promotional rights under the 2013 Settlement Agreement, and for refusing to renew plaintiff's *El Salvador* permit as required by the 2013 Settlement Agreement; and (2) tortious interference with plaintiff's contractual rights under the 1998 Agreement and the 2013 Settlement Agreement against FoQAR. Both State Defendants and FoQAR moved to dismiss plaintiff's second amended complaint.

On 13 October 2017, the trial court, in pertinent part, dismissed the following with prejudice: (1) plaintiff's breach of contract claims against the State Defendants under the 1998 Agreement; (2) plaintiff's

claim that FoQAR tortiously interfered with plaintiff's contractual rights under both the 1998 Agreement and the 2013 Settlement Agreement; and (3) plaintiff's breach of contract claim against the State Defendants under the 2013 Settlement Agreement stemming from the State Defendants' refusal to renew plaintiff's *El Salvador* permit. It also dismissed without prejudice plaintiff's breach of contract claim against the State Defendants under the 2013 Settlement Agreement stemming from DNCR's alleged violations of plaintiff's media and promotional rights.

On 9 November 2017, plaintiff filed a notice of appeal from the trial court's decision; however, that notice of appeal named the Court of Appeals, not this Court, as the judicial body to which plaintiff had a statutory right of appeal. *See* N.C.G.S. § 7A-27(a)(2) (2017). Accordingly, on 10 April 2018, the State Defendants filed a motion to dismiss the appeal. Before the State Defendants filed their motion to dismiss the appeal, plaintiff filed a petition for writ of certiorari to this Court seeking review of the trial court's 13 October 2017 opinion and order dismissing its second amended complaint. The trial court dismissed plaintiff's appeal on 4 May 2018. We, however, allowed the petition for writ of certiorari on 5 December 2018. Pursuant to plaintiff's certiorari petition, we now review whether the trial court erred in dismissing plaintiff's second amended complaint to the extent summarized above.

Analysis

We conclude that the trial court properly dismissed plaintiff's claims against the State Defendants for breach of the 1998 Agreement and its claim against FoQAR for tortious interference with contract. However, we also conclude that the trial court erred in dismissing plaintiff's claims for (1) breach of the 2013 Settlement Agreement stemming from DNCR's alleged violations of plaintiff's media and promotional rights; and (2) breach of the 2013 Agreement stemming from DNCR's non-renewal of plaintiff's *El Salvador* permit. Accordingly, we affirm in part, reverse in part, and remand to the trial court.

A. Standard of Review

This Court reviews de novo the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citations omitted). "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Id.* (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

Dismissal of a claim under Rule 12(b)(6) is proper when one or more of the following is satisfied: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact[s] sufficient to make a [ ] claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. Jag, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)) (other citation omitted). However, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [a] claim which would entitle [the plaintiff] to relief." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165–66 (1970) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–63, 127 S. Ct. 1955, 1968–69, 167 L. Ed. 2d 929, 943–44 (2007)).

This Court also reviews a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure de novo and it may consider matters outside of the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

B. Breach of Contract: The 1998 Agreement

[1] The trial court dismissed plaintiff's breach of contract claims against the State Defendants under the 1998 Agreement because it concluded that "the 2013 Settlement Agreement was a novation of the 1998 Agreement and that Plaintiff's rights under the 1998 Agreement have been extinguished." We affirm.

"A novation is the substitution of a new contract for an old one which is thereby extinguished." *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965) (citing *Tomberlin v. Long*, 250 N.C. 640, 109 S.E.2d 365 (1959)). "The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract." *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68 (citation omitted). Further, in determining whether a later contract is a novation of a prior contract,

> [t]he intent of the parties governs. . . . If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If

> the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989) (citing *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68; *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955); *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E.2d 503 (1946)).

Here, neither plaintiff nor the State Defendants have argued before this Court that either the 1998 Agreement or the 2013 Settlement Agreement are invalid.[3] Further, plaintiff and the State Defendants both agreed to the 2013 Settlement. Therefore, if the parties intended the 2013 Settlement Agreement to be a novation of the 1998 Agreement, it extinguished the 1998 Agreement. *See Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68; *Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827.

The words of the 2013 Settlement Agreement themselves "make it clear . . . the second contract supersedes the first." *Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827. Specifically, the 2013 Settlement Agreement states that it "supersedes the 1998 Agreement, *attached as* ***Attachment A***, and all prior agreements between D[N]CR, [plaintiff], and Nautilus regarding the *QAR* project." (emphases added). Because the language of the 2013 Settlement Agreement so clearly demonstrates the parties' intent that it would function as a novation of the 1998 Agreement, our analysis can end with the plain wording of the agreement. *See Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827 (stating that a court will look to the circumstances surrounding the second agreement to determine whether it is a novation "*if the words [of the agreement] do not make it clear*" (emphasis added))).

Because the 2013 Settlement Agreement was a novation of the 1998 Agreement, plaintiff's breach of contract claims arising from the 1998 Agreement are "extinguished." *See Carolina Equip. & Parts Co.*, 265 N.C. at 400, 144 S.E.2d at 257 (citing *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367).

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3. In its brief, plaintiff points to the State Defendants' second affirmative defense in their answer to plaintiff's original complaint, in which the State Defendants appear to have asserted that certain paragraphs of the 1998 Agreement and the 2013 Settlement Agreement are unenforceable because they are against public policy. However, plaintiff does not actually argue that either agreement is invalid, and neither do the State Defendants.

Accordingly, we affirm the decision of the trial court to dismiss plaintiff's breach of contract claims under the 1998 Agreement.

C. Tortious Interference

[2] The trial court dismissed plaintiff's tortious interference with contract claim against FoQAR under the 1998 Agreement and the 2013 Settlement Agreement because

> [m]ere allegations that DNCR employees also served as members of F[o]QAR's board of directors, or that DNCR permitted F[o]QAR to film recovery operations and post videos to its website or to dive the *QAR* wreck do not amount to allegations of purposeful conduct on the part of F[o]QAR that was intended to induce DNCR to breach any contracts.

We affirm.

A claim for tortious interference with contract has the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 700, 784 S.E.2d 457, 462 (2016) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

The first theory by which plaintiff asserts that FoQAR tortiously interfered with the 1998 Agreement and the 2013 Settlement Agreement appears to be that the FoQAR was a mere "shadow corporation of DNCR through which certain upper level employees of DNCR sought to profit from contracts, books, tours, personal promotion, etc., connected to the *QAR* Project." Under this theory, plaintiff claims that certain DNCR employees (dual hat employees) with "specific responsibility for oversight of *QAR* Project and [plaintiff's] *El Salvador* search permit," "wore dual hats" as "officers and agents of DNCR" while also serving as "office[r]s, agents, and directors of . . . FoQAR." Therefore, plaintiff asserts that any action that the dual hat employees took in their capacities at DNCR (1) was the result of a "conflict of interest"

and an "unethical relationship[ ]"; and (2) was also imputed to FoQAR. Plaintiff's complaint appears to attempt to support the imputation theory by invoking the doctrine of respondeat superior. However, neither plaintiff's complaint, nor its briefs filed in this Court, cite any authority to support its application of that doctrine to these facts.

We conclude that the trial court correctly determined that "[m]ere allegations that DNCR employees also served as members of F[o]QAR's board of directors" do not amount to allegations that FoQAR intentionally induced DNCR to not perform its obligations under either the 1998 Agreement or the 2013 Settlement Agreement.

Specifically, plaintiff has alleged that the dual hat employees (1) had "specific responsibility for oversight of *QAR* Project and [plaintiff's] *El Salvador* search permit," (2) were serving as employees of DNCR and FoQAR under a "conflict of interest" and an "unethical relationship[ ]," and (3) were conspiring "with FoQAR to violate multiple provisions of the *QAR* Settlement Agreement." However, plaintiff has not alleged how the dual hat employees intentionally used their positions to induce DNCR to breach either the 1998 Agreement or the 2013 Settlement Agreement. *See Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 700, 784 S.E.2d at 462 (citing *United Labs., Inc.*, 322 N.C. at 661, 370 S.E.2d at 387). We are persuaded that plaintiff's allegations show, at most, that the dual hat employees "induced themselves to breach the 1998 Agreement and [2013] Settlement Agreement."

In addition to its overarching shadow corporation theory, plaintiff alleged that FoQAR tortiously interfered with the 1998 Agreement when, in mid-2013, FoQAR agreed to pay third party companies to produce "various materials, including videos and a website" about the *QAR* Project. Plaintiff also alleged that some of the payment pursuant to the agreement went to the spouse of a dual hat employee. However, these allegations—involving an agreement between FoQAR and third parties, which did not include DNCR—are devoid of any conduct by FoQAR that "intentionally induce[d]" *DNCR* to not perform on its contract with plaintiff. *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 700, 784 S.E.2d at 462 (quoting *United Labs., Inc.*, 322 N.C. at 661, 370 S.E.2d at 387).

Moreover, plaintiff alleged that FoQAR tortiously interfered with the 2013 Agreement by: (1) contracting with an independent media company to film *QAR* recovery operations and posting the footage on the FoQAR Facebook page without a time code stamp, watermark, or website link; and (2) bringing the crew of a local radio show to dive the *QAR* shipwreck and shoot footage from aboard the recovery vessel. As with

the allegations addressed above, plaintiff's allegations here—involving agreements with third parties other than DNCR, and involving FoQAR's own conduct in posting footage of the recovery operation to its own Facebook page—fail to mention any conduct by FoQAR that intentionally induced *DNCR* to not perform on its contract with plaintiff.

Accordingly, we affirm the decision of the trial court to dismiss plaintiff's tortious interference with contract claim.

D. Breach of Contract: *QAR* Media Rights Under the 2013 Settlement Agreement

[3] The trial court dismissed for lack of subject matter jurisdiction plaintiff's claim that DNCR breached the 2013 Settlement Agreement by violating plaintiff's *QAR* media rights. Specifically, the trial court concluded that plaintiff (1) failed to exhaust administrative remedies; and (2) did not allege that administrative exhaustion would be futile. The trial court reached this conclusion because plaintiff dismissed its second petition for a contested case hearing under the North Carolina Administrative Procedure Act (the APA) and then filed a breach of contract claim in superior court without a final decision by the OAH. We reverse.

Our analysis of whether a plaintiff may bring a breach of contract claim against a State agency in superior court begins with our holding in *Smith v. State* "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract[,]" and accordingly, the State cannot invoke the doctrine of sovereign immunity as a defense. 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

We later concluded, however, that the holding in *Smith* was "superfluous" where "statutory provisions . . . permit an aggrieved party, *after exhausting certain administrative remedies*, to institute a civil contract action in Superior Court." *Middlesex Const. Corp. v. State ex rel. State Art Museum Bldg. Comm'n*, 307 N.C. 569, 573–74, 299 S.E.2d 640, 643 (1983) (emphasis added). In *Middlesex*, we ultimately held that the superior court lacked subject matter jurisdiction to adjudicate plaintiff's breach of contract claims arising from its construction contract with the State in the first instance. *Id.* at 575, 299 S.E.2d at 644. We reasoned that the plaintiff was ultimately required to pursue its claims under the provisions of N.C.G.S. § 143-135.3, which provided the requisite procedure "[w]hen a claim arises prior to the completion of any contract for construction or repair work awarded by any State board to any contractor

under the provisions of this Article." *Id.* at 571, 299 S.E.2d at 641 (quoting N.C.G.S. § 143-135.3 (Supp. 1981)). In support of this reasoning, we determined that the language of N.C.G.S. § 143-135.3

> could not be clearer: although a contractor may ultimately file an action in Superior Court, the exhaustion of administrative remedies as provided [by the statute] is a *condition precedent* to such action, and the provisions become *a part of every contract* entered into between the State and the contractor.

Id. at 573, 299 S.E.2d at 642.

The State Defendants rely on our decision in *Middlesex*, along with our decision in *Abrons Family Practice and Urgent Care, PA v. N.C. Dep't of Health and Human Servs.*, 370 N.C. 443, 810 S.E.2d 224 (2018), in arguing that the trial court was correct to dismiss plaintiff's claim because plaintiff failed to exhaust administrative remedies. The State Defendants argue that the APA provided plaintiff with an administrative remedy here under N.C.G.S. § 150B-23(a). The State Defendants' argument is unavailing.

First, we note that our decision in *Middlesex* does not support the conclusion that plaintiff was required to exhaust any administrative remedy under N.C.G.S. § 150B-23(a) before filing a common law breach of contract claim in superior court. As an initial matter—and unlike the relevant statute in *Middlesex*—N.C.G.S. § 150B-23(a) provides no administrative procedure which specifically applies to plaintiff's contract claim. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically creating an administrative procedure for "[w]hen a claim arises prior to the completion of any contract for construction or repair work awarded by any State board to any contractor under the provisions of this Article"). Accordingly—and also unlike the relevant statute in *Middlesex*—neither N.C.G.S. § 150B-23(a) nor our decision in *Smith* explicitly make any specific administrative procedure a "condition precedent" to bringing a contract claim in superior court. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically stating that following the administrative procedure set forth in the statute "shall be a condition precedent" to filing suit in superior court). Additionally—and also unlike the relevant statute in *Middlesex*—N.C.G.S. § 150B-23(a) does not explicitly make a specific administrative procedure part of every contract entered into between the State and a private citizen. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically stating that the

administrative procedure "shall . . . form a part of every contract entered into between any board of the State and any contractor"). Accordingly, N.C.G.S. § 150B-23(a) does not disturb the superior court's "*original general* jurisdiction of *all* justiciable matters of a civil nature."[4] N.C.G.S. § 7A-240 (2017) (emphasis added). We decline to read N.C.G.S. § 150B-23 as creating a specific requirement for the exhaustion of administrative remedies. Accordingly, in the absence of a specific statutory exhaustion requirement, we affirm our holding in *Smith* that, generally, where the State enters into a contract, it consents to be sued in the event of a breach of the contract.

Moreover, the text of the 2013 Settlement Agreement does not make the exhaustion of a specific administrative procedure a condition precedent to filing a breach of contract claim in superior court, nor does it provide a specific procedure for settling disputes under the contract. The only provision in the 2013 Settlement Agreement concerning breach provides that, "[i]n the event D[N]CR, [plaintiff], or Nautilus breaches this Agreement, D[N]CR, [plaintiff], or Nautilus may avail themselves of all remedies provided by law or equity."

Accordingly, here—unlike in *Middlesex*—plaintiff's ability to bring a common law breach of contract claim in superior court was not restricted by any statutory or contractual provision. As a result, the State Defendants cannot rely on *Middlesex* for the proposition that plaintiff was barred from bringing its claim in superior court in the first instance. *See Middlesex*, 307 N.C. at 570, 229 S.E.2d at 641.

The State Defendants' reliance on *Abrons* is also misplaced. In *Abrons*, plaintiffs—all of whom were health care providers—filed suit against the North Carolina Department of Health and Human Services (DHHS), and Computer Sciences Corporation (CSC). *Abrons*, 370 N.C. at 444–45, 810 S.E.2d at 226. DHHS entered into a contract with CSC to develop a new Medicaid Management Information System (later named NCTracks). *Id.* at 445, 810 S.E.2d at 226. After the system went live,

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4. Under the General Statutes, it is the General Court of Justice—not an "independent, *quasi-judicial agency*" such as the OAH, N.C.G.S. § 7A-750 (2017) (emphasis added)—which is presumed to have "general jurisdiction" over "matters of a civil nature." N.C.G.S. § 7A-240; *see also Reaves v. Earle-Chesterfield Mill Co.*, 216 N.C. 462, 465, 5 S.E.2d 305, 306 (1939) (concluding that an "administrative [body], with quasi-judicial functions," and with "special or limited jurisdiction created by statute[,]" is not a court of general jurisdiction and its jurisdiction can be "enlarged or extended only by the power creating the court." (citations omitted)).

DNCR acknowledged this state of the law in its motion to dismiss plaintiff's second petition for a contested case.

plaintiffs began submitting claims to DHHS for Medicaid reimbursements. *Id.* at 445, 810 S.E.2d at 226. However, "[i]n the first few months of being in operation, [the system] experienced over 3,200 software errors, resulting in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs." *Id.* As a result, plaintiffs filed claims—including claims for monetary damages—alleging "that CSC was negligent in its design and implementation of [the system] and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements." *Id.* Further, plaintiffs alleged that "they had a contractual right to receive payment for reimbursement claims and that this was 'a property right that could not be taken without just compensation.' " *Id.* Moreover, plaintiffs "sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules." *Id.*

After receiving adverse determinations on their reimbursement claims, plaintiffs failed to request a reconsideration review or file a petition for a contested case, as specifically required by DHHS procedures. *Abrons*, 370 N.C. at 448, 810 S.E.2d at 228; *see also id.* at 446–47, 810 S.E.2d at 227–28 (discussing DHHS regulations and provisions of the APA which specifically require Medicaid providers to request a reconsideration review and file a petition for a contested case hearing before obtaining judicial review). As a result, we held that the trial court correctly dismissed plaintiffs' claims because they failed to exhaust their administrative remedies and failed to demonstrate that such exhaustion would be futile. *Id.* at 453, 810 S.E.2d at 232.

Here, plaintiff has filed a claim against the State Defendants for their alleged violations of plaintiff's media rights under the 2013 Settlement Agreement. Unlike the relevant claims in *Abrons*, this claim is exclusively one for common law breach of contract and, therefore, it is not a mere "insertion of a prayer for monetary damages" into what is otherwise a claim that is primarily administrative. *See id.* at 452, 810 S.E.2d at 231.

Because plaintiffs' claim here is a common law breach of contract claim, and the State Defendants have failed to demonstrate that this case is governed by our holdings in either *Middlesex* or *Abrons*, or any other provision requiring plaintiff to exhaust administrative procedures, we conclude that plaintiff was not required to exhaust administrative remedies before bringing its breach of contract claim in superior court.

Our conclusion that the trial court had subject matter jurisdiction over plaintiff's claim is supported by the APA. Specifically, the APA

provides that "[n]othing in this Chapter shall prevent any party or person aggrieved from invoking *any judicial remedy available to the party or person aggrieved under the law* to test the validity of *any administrative action not made reviewable under this Article*." N.C.G.S. § 150B-43 (2017) (emphases added); *see also Pachas v. N.C. Dep't of Health & Human Servs.*, 822 S.E.2d 847, 855 (N.C. 2019).

Here, the relevant judicial remedy available to plaintiff is a common law breach of contract claim. As addressed above, we reject the State Defendants' argument that the APA makes such a common law claim reviewable through the administrative process under N.C.G.S. § 150B-23(a)—which provides the procedure for commencing a contested case.

As a result, the trial court erred in concluding that it lacked subject matter jurisdiction over plaintiff's claim. Because the trial court had jurisdiction to adjudicate plaintiff's claim, plaintiff need not have demonstrated that exhaustion of administrative remedies would be futile. *See Pachas*, 822 S.E.2d at 857 ("Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile here."). Accordingly, we reverse the trial court's conclusion that it lacked subject matter jurisdiction over plaintiff's claim.

E. Breach of Contract: *El Salvador* Permit

[4] The trial court dismissed plaintiff's breach of contract claim based on DNCR's failure to renew the *El Salvador* permit because it concluded that the claim was barred by the trial court's 7 November 2016 order under "the doctrine of res judicata"[5] because "[p]laintiff's breach of

5. Even though the trial court's order discussed "the doctrine of collateral estoppel, or issue preclusion" at some length, it ultimately concluded only that plaintiff's breach of contract claim as to the *El Salvador* permit was "barred by the doctrine of res judicata." Accordingly, of the two doctrines, we will address only whether plaintiff's claim is barred by the doctrine of res judicata. These two doctrines, although historically recognized "as species of a broader category of 'estoppel by judgment,' " are not interchangeable. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491–92, 428 S.E.2d 157, 161 (1993)). Specifically, res judicata, or claim preclusion, functions to bar a plaintiff's entire "*cause of action*," whereas collateral estoppel, or issue preclusion, bars only "the subsequent adjudication of *a previously determined issue*, even if the subsequent action is based on an entirely different claim." *Id.* at 15, 591 S.E.2d at 880 (emphases added) (citing *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994)). Therefore, although "[t]he two doctrines are complimentary," they are not the same. *Id.* at 15–16, 591 S.E.2d at 880.

contract claim was raised in the contested case proceeding" that ultimately reached the trial court on judicial review, and the order constituted "a final adjudication on the merits in the administrative matter." We reverse.

As an initial matter, "[t]he fact that the original claim arose in a quasi-judicial administrative hearing" does not preclude the applicability of res judicata. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 14–15, 387 S.E.2d 655, 664 (1990). "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994)). Further, "[t]he doctrine prevents the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action.' " *Id.* at 15, 591 S.E.2d at 880 (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). However, neither *Whitacre* nor *McInnis* provide guidance on what "matters," are considered to be barred by a prior action. *See id.* at 15, 591 S.E.2d at 880 (ultimately applying the separate doctrine of judicial estoppel); *see also McInnis*, 318 N.C. at 428, 349 S.E.2d at 556 (holding that the doctrine of res judicata was inapplicable in that action).

Our decision in *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993), provides guidance on what matters are barred by res judicata. Specifically, in *Bockweg*, we stated that "[w]hile it is true that a 'judgment is conclusive as to all issues raised by the pleadings,' . . . the judgment is not conclusive as to issues not raised by the pleadings which serve as the basis for the judgment." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161–62 (citation omitted). In *Tyler v. Capehart*, we stated that a

> judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them . . . .[but] does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

125 N.C. 64, 70, 34 S.E. 108, 109 (1899).

Here, there is no dispute that the trial court's order was (1) "a final judgment"[6]; and (2) that the final judgment was "between the same parties or their privies." *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880. The issues are whether the final judgment was "on the merits" and whether that judgment concerned the "same cause of action"—namely plaintiff's breach of contract claim arising from DNCR's denial of plaintiff's permit to search for *El Salvador*. *Bockweg*, 333 N.C. at 492–93, 428 S.E.2d at 162 (citing and quoting *Tyler*, 125 N.C. at 70, 34 S.E. at 109).

We conclude that the trial court's order was not a final judgment on the merits of plaintiff's breach of contract claim because that claim is a separate cause of action which was not raised by plaintiff's pleadings before the trial court, and which cannot be "properly predicated upon [those pleadings]." *Bockweg*, 333 N.C. at 492–93, 428 S.E.2d at 162 (citing *Tyler*, 125 N.C. at 70, 34 S.E. at 109). Specifically, in its petition for judicial review, plaintiff only ever asserted that DNCR was "contractually bound," to continue renewing the *El Salvador* permit in support of plaintiff's argument that the OAH's final agency decision affirming the denial of the permit was "in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency or the administrative law judge, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence and is arbitrary, capricious and is an abuse of discretion." In this vein, plaintiff asserted that "[DNCR] had previously entered into an agreement with [plaintiff], known as the [2013] Settlement Agreement, in which [DNCR] bound itself to continue renewing [the *El Salvador* permit] 'through the year in which the *QAR* archaeology recovery phase is declared complete so long as the requirements contained in [the *El Salvador* permit] are fulfilled.' "

Further, nowhere in plaintiff's petition for judicial review did it make the following necessary allegations for a breach of contract claim: "[(1)] the existence of a contract between plaintiff and defendant, [(2)]

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6. Plaintiff does argue, without citing to authority, that the trial court's order was somehow a "deferral" to DNCR's decision to deny the *El Salvador* permit and, therefore, the order was not a final judgment. However, this argument is without merit because the order specifically granted summary judgment in the State Defendants' favor, while denying and dismissing plaintiff's petition. Therefore, the trial court's order constitutes a final judgment. *See Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citing *Sanders v. May*, 173 N.C. 47, 49, 91 S.E. 526, 527 (1917); *Bunker v. Bunker*, 140 N.C. 18, 22–24, 52 S.E. 237, 238–39 (1905); *McLaurin v. McLaurin*, 106 N.C. 331, 335, 10 S.E. 1056, 1057 (1890); *Flemming v. Roberts*, 84 N.C. 532, 538–39 (1881)).

the specific provisions breached, [(3)] the facts constituting the breach, and [(4)] the amount of damages resulting to plaintiff from such breach." *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (quoting *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968)). Even assuming—without deciding—that plaintiff's aforementioned assertions were allegations concerning the existence of the 2013 Settlement Agreement, as well as the specific provision of the contract at issue, plaintiff's petition for judicial review still failed to sufficiently allege that the denial of the permit constituted a breach of the 2013 Settlement Agreement, and failed to allege an amount of damages. Therefore, the pleading before the trial court did not raise plaintiff's breach of contract claim, and plaintiff could not have "properly predicate[d]" a breach of contract claim upon that pleading. *Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162 (citation omitted). Accordingly, the trial court erred in dismissing plaintiff's breach of contract claim based on DNCR's failure to renew the *El Salvador* permit through the doctrine of res judicata.

The State Defendants argue to the contrary, stating that our prior decision in *Batch* is controlling here and requires the Court to conclude that plaintiff's claim was barred by res judicata. Because *Batch* is distinguishable from this case, we do not agree. In *Batch*, a property owner submitted an application to subdivide her property to the Town of Chapel Hill. *Batch*, 326 N.C. at 4, 387 S.E.2d at 657. In its ultimate resolution concerning the property owner's subdivision application, the planning board denied the application on the grounds that the subdivision application was not consistent with several aspects of the town's development ordinance. *Id.* at 7–8, 387 S.E.2d at 659–60. After the planning board denied her application, the property owner filed a "combined complaint and petition for writ of certiorari" in Superior Court, Orange County. *Id.* at 8, 387 S.E.2d at 660. The trial court determined that the claims were properly joined and issued the writ of certiorari. *Id.* at 8, 387 S.E.2d at 660. After that, the property owner moved for summary judgment and the trial court ordered the town to approve the property owner's preliminary plat with a minor exception. *See id.* at 10, 387 S.E.2d at 661.

On appeal, this Court first held that the trial court erred in joining the proceedings pursuant to the writ of certiorari and the complaint. *Batch*, 326 N.C. at 11, 387 S.E.2d at 661–62. Even though we determined that it was error to join the two proceedings, we did not remand the entire case on that basis but, instead, addressed the remaining issues. *Id.* at 11, 387 S.E.2d at 662. In reviewing the issues raised pursuant to

the property owner's petition for writ of certiorari, we held, in pertinent part, that "the Town Council properly denied [the property owner's] petition for approval of her subdivision," and, accordingly, we reversed the decision of the Court of Appeals. *Id.* at 13, 387 S.E.2d at 663. In reviewing the issues raised by the property owner's complaint, we determined that (1) "summary judgment should have been entered for the [town]"; and (2) "[the property owner's] complaint should be dismissed." *Id.* at 14, 387 S.E.2d at 663–64.

The basis for the Court's conclusions that summary judgment should have been granted in favor of the town, pursuant to the property owner's complaint, and that the property owner's complaint should be dismissed, was that "[i]t having been determined *in this opinion* that the Town Council of Chapel Hill properly denied approval of [the property owner's] subdivision plan," *Batch*, 326 N.C. at 14, 387 S.E.2d at 663 (emphasis added), under the issues raised by the petition for writ of certiorari, "[t]he foundation of [the property owner's] alleged causes of action [in her complaint] [was] determined against her," *id.* at 14, 387 S.E.2d at 663–64.

In describing how the Court's holdings on the issues raised by the petition for writ of certiorari *resolved* the issues raised by the complaint, we discussed the doctrine of res judicata. *Batch*, 326 N.C. at 14, 387 S.E.2d at 663–64 (concluding that it was unnecessary to review "any of [the property owner's] constitutional claims or other issues arising upon her complaint" because they were "based solely upon the alleged improper refusal by the Town Council to approve her subdivision plans"). Specifically, we determined that our holding under the issues raised by the property owner's petition for writ of certiorari—that "the Town Council properly denied [the property owner's] petition for approval of her subdivision"—barred, within the same opinion, any conclusion that she was entitled to summary judgment on the constitutional statutory claims raised by her complaint. *See id.* at 13–14, 387 S.E.2d at 663–64. As such, our application of res judicata in *Batch* resulted from a complex, fact-specific, procedural posture that is not applicable to the facts here.

Accordingly, we reverse the trial court's conclusion that plaintiff's breach of contract claim based upon the State Defendants' refusal to renew the *El Salvador* permit was barred by res judicata.

Conclusion

For the above reasons, we conclude that the trial court (1) properly dismissed plaintiff's breach of contract claims against the State Defendants which arose from the 1998 Agreement; (2) properly dismissed

plaintiff's tortious interference with contract claim against FoQAR; (3) erred in dismissing plaintiff's breach of contract claim against the State Defendants concerning its *QAR* media rights under the 2013 Settlement Agreement for lack of subject matter jurisdiction; and (4) erred in dismissing plaintiff's breach of contract claim against the State Defendants arising from DNCR's failure to renew plaintiff's *El Salvador* permit. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

While I fully concur with my learned colleagues of the majority with respect to plaintiff's claims for breach of the 1998 Agreement, breach of the contractual provisions relating to media rights contained in the 2013 Settlement Agreement, and tortious interference with contract, I respectfully dissent from their determination that the Business Court erred in concluding that plaintiff's breach of contract claim arising from DNCR's refusal to renew plaintiff's permit to search for the shipwreck remains of the *El Salvador* was barred by the doctrine of res judicata. In my view, our longstanding precedent regarding claim preclusion in conjunction with the record on appeal in this matter indicates that this principle applies to plaintiff's *El Salvador* claim. Accordingly, I would affirm the Business Court on this issue.

As noted in the majority opinion, the 2013 Agreement provided that DNCR would

> continue to issue to Intersal an exploration and recovery permit for the shipwreck *El Salvador* . . . . through the year in which the *QAR* [*Queen Anne's Revenge*] archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. Subject to the provisions of Article 3 of Chapter 121 of the North Carolina General Statutes . . . and the North Carolina Administrative Code, [DNCR] agrees to recognize Intersal's efforts and participation in the *QAR* [P]roject as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permit for the *El Salvador*.

In sum, to the extent that it would be consistent with our General Statutes and the North Carolina Administrative Code, plaintiff's work on the *QAR* project would be deemed to "satisfy any performance

requirements" for renewal of the *El Salvador* permit. However, when plaintiff applied for a renewal of the permit in 2015, the application was denied. DNCR gave two reasons for the denial: 1) plaintiff's failure "to fulfill material requirements set forth in" the *El Salvador* permit and 2) that renewal was "not deemed to be in the best interest of the State" due to its receipt of a letter dated 30 November 2015 from the Kingdom of Spain which "expressed [the Kingdom of Spain's] intent on maintaining control of the shipwreck and cargo of the *El Salvador* and asserted its position to defend its title," along with stressing Spain's claim that the State of North Carolina lacked the authority to issue a permit to recover the *El Salvador*. Plaintiff believed that this refusal to renew the permit violated the terms of the 2013 Settlement Agreement as quoted above.

As a result of, *inter alia*, DNCR's refusal to renew the permit to search for the *El Salvador*, plaintiff filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH), seeking to compel DNCR to renew the permit.[1] The majority recognizes this development in its opinion in stating that plaintiff had "asserted that DNCR was 'contractually bound' to continue renewing the *El Salvador* permit" under terms of the 2013 Settlement Agreement and had failed to do so.

DNCR moved to dismiss the contested case. In a "Final Decision Order of Dismissal" dated 27 May 2016, the ALJ assigned to the contested case by the OAH did not address DNCR's subject matter jurisdiction argument. Instead, the ALJ resolved the contested case upon the finding, *inter alia*, that plaintiff "failed to allege that it had permission from the Kingdom of Spain to engage in the exploration and recovery of the historic shipwreck site of the *El Salvador*," citing the November 2015 letter from the Kingdom of Spain and, among other authorities, *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 640–41 (4th Cir. 2000) (stating "that a shipwreck is abandoned only where the owner has relinquished ownership rights. . . . [and w]hen an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show") (citing 43 U.S.C. § 2101(b)). As a result, the ALJ granted DNCR's motion to dismiss the contested case for failure to state a claim upon which relief can be granted. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2017).

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1. The contested case filing in 15DCR09742 is not part of the record on appeal, but plaintiff's assertion in the OAH that DNCR was "contractually bound" to issue the permit renewal is referenced in decisions issued by the Administrative Law Judge (ALJ), the superior court which undertook the judicial review of the final agency decision, and the Business Court.

Pursuant to N.C.G.S. § 150B-45, plaintiff sought judicial review of the OAH final decision, asserting that "continued renewal of [the *El Salvador* permit] is required by the terms of the QAR Settlement Agreement (2013)" and that DNCR "refused to renew [the *El Salvador* permit] on November 1, 2015, giving rise to this contested case." In its petition for judicial review, plaintiff further alleged:

> The ALJ ignored several additional Petitioner's arguments raised in briefs, exhibits and oral arguments, including, without limitation, that . . . [DNCR] is contractually bound by the [2013] Settlement Agreement to continue renewing [the *El Salvador* permit] "through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in [the *El Salvador* permit] are fulfilled."

The matter was heard in the Superior Court, Wake County. In an order entered 7 November 2016, the superior court noted that the ALJ had determined a broader issue than that presented in plaintiff's petition for a contested case hearing, in that the ALJ purported to resolve the ownership of the *El Salvador*, while the actual issue raised by plaintiff's OAH contested case petition was whether or not DNCR's asserted reason for its denial of the permit renewal—that it would not be in the best interest of the State of North Carolina to issue such a permit given the assertion of ownership by the Kingdom of Spain—was arbitrary or capricious, as plaintiff had couched the administrative controversy in those terms in its OAH petition. However, the superior court determined that remand to the OAH was not necessary despite this error, because the North Carolina General Statutes provide that "[i]n reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56." N.C.G.S. § 150B-51(d) (2017). In its order, the superior court then 1) determined that the record in the matter was fully developed and all issues were thoroughly briefed, such that it could resolve defendant's motion for summary judgment which was filed in the alternative to its motion to dismiss on the pleadings and 2) held that the denial of the *El Salvador* permit renewal was not arbitrary and capricious, but instead was in the best interest of the State in light of the ownership assertion of the Kingdom of Spain. With this analysis, the superior court affirmed OAH's dismissal of the contested case. Plaintiff did not appeal from this determination.

However, in the subsequent civil suit which was brought before the Business Court and which this Court has now been engaged to address,

plaintiff pursued a breach of contract claim, contending that defendants breached the 2013 Settlement Agreement when defendants denied the plaintiff's request for the renewal of the *El Salvador* permit in 2015. The Business Court viewed this claim as barred by the operation of the doctrine of res judicata, holding that the superior court's "[o]rder was a final adjudication on the merits in the administrative matter" and that "[p]laintiff's breach of contract claim was raised in the contested case proceeding."

As the majority decision correctly notes,

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters . . . that *were or should have been adjudicated* in the prior action." [*Thomas M.*] *McInnis* [*& Assocs. v. Hall*], 318 N.C. [421,] 428, 349 S.E.2d [552,] 556 [(1986)].

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (emphasis added; first alteration in original); *see also Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (holding that a judgment is conclusive on all issues raised by the pleadings). In *Bockweg*, we further explored the doctrine's application in observing that "subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of res judicata." 333 N.C. at 494, 428 S.E.2d at 163 (addressing a case in which the "[p]laintiffs did not merely change their legal theory or seek a different remedy. . . . [but r]ather, [were] seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury").

The disputed question in the present case is whether the pertinent claim—breach of the *El Salvador* permit renewal provision of the 2013 Settlement Agreement—was "or should have been adjudicated in the" OAH proceeding that concluded with the superior court order dismissing plaintiff's petition; if so, then it cannot be revisited in this case. In the view of the majority, the well-established principle of res judicata or claim preclusion does not apply here to bar plaintiff from re-litigating the question of whether DNCR breached the 2013 Settlement Agreement

by failing to renew the *El Salvador* permit, based upon the majority's deductive reasoning that the breach of contract claim "was never considered" because the superior court's order did not expressly address the issue, but instead focused upon the alternative basis for plaintiff's challenge of the permit denial by defendants regarding the superior court's determination that the renewal of the permit was not in the best interest of the State. Further, although the majority acknowledges that in the OAH proceeding plaintiff "asserted that DNCR was 'contractually bound' to continue renewing the *El Salvador* permit," my colleagues with the majority view take the position that plaintiff did not make allegations to support a breach of contract claim in its petition for judicial review and therefore conclude that "the pleading before [the superior court] did not raise plaintiff's breach of contract claim." The majority also focuses on the concept that plaintiff did not plead an amount of damages—an element of a civil breach of contract claim—and therefore that the OAH could not have awarded monetary damages to plaintiff in the contested case proceeding, in an effort to fortify the rationale for this case outcome. However, the majority misapprehends both our precedent and the procedural posture of the case on this point.

As an initial matter, contrary to the majority's reasoning, plaintiff's petition for judicial review was not a "pleading" as that term is construed in the appellate case law which applies the doctrine of res judicata when discussing what issues were raised and what "matters . . . were or should have been adjudicated in the prior action." *Thomas M. McInnis & Assocs.*, 318 N.C. at 428, 349 S.E.2d at 556. Here, the petition for judicial review which afforded the superior court its jurisdiction is more properly viewed as an appeal document initiating appellate review, instead of a pleading initiating a legal controversy in the first instance. In this regard, the contested case petition filed in the OAH was the "pleading" for purposes of proper evaluation of the application of res judicata.

More importantly, in the OAH contested case proceeding, plaintiff asserted that the 2013 Settlement Agreement "contractually" bound DNCR to renew the *El Salvador* search permit and that DNCR did not renew said permit. *See Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (holding that, generally, a judgment is conclusive on all issues that are raised or could have been raised by the pleadings). However, the fact that plaintiff sought one remedy—renewal of the permit—in the OAH proceeding and a different remedy—money damages—in the civil suit does not remove plaintiff's essential claim—that the contract as evidenced by the 2013 Settlement Agreement was breached—from the bar of res judicata. *See id.* at 494, 428 S.E.2d at 163 ("[S]ubsequent actions which attempt to

proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of res judicata"); *see also Cannon v. Durham Cty. Bd. of Elections*, 959 F. Supp. 289, 292 (E.D.N.C.) ("[R]es judicata operates to bar all related claims and thus plaintiffs are not entitled to a separate suit merely by shifting legal theories"), *aff'd*, 129 F.3d 116 (4th Cir. 1997).

In sum, plaintiff had the opportunity to fully argue its contract-based claim regarding DNCR's refusal to renew the permit to search for the *El Salvador* in the OAH proceeding, and the Business Court correctly held that the doctrine of res judicata dictates that plaintiff could not have a second bite at that particular apple in its civil court action. Accordingly, I dissent from the majority on this issue and would affirm the Business Court regarding it.

Justice ERVIN joins in this separate opinion.

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. 126A18

Filed 1 November 2019

1. Accomplices and Accessories—accessory after the fact—sexual abuse of child—not reported

The trial court erred by not dismissing the charge of being an accessory after the fact where defendant mother did not report the sexual abuse of her daughter by her adopted father. The superseding indictment alleged only that defendant became an accessory after the fact by not reporting a specific incident on or about a specific date, and the mere failure to give information about a crime is not sufficient to establish the crime of accessory after the fact.

2. Obstruction of Justice—sufficiency of evidence—denial of access to child sexual abuse victim

There was sufficient evidence, taken in the light most favorable to the State, to support defendant mother's conviction for felonious obstruction of justice where she denied officers and social workers access to her child after the child alleged that she had been sexually assaulted by her adoptive father.

Justice ERVIN concurring in part and dissenting in part.

Justice NEWBY joins in this separate opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 812 S.E.2d 896 (2018), finding no error in part and reversing in part judgments entered on 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. On 20 September 2018, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 10 April 2019.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State-appellant.

Jarvis John Edgerton, IV for defendant-appellee.

HUDSON, Justice.

Here we must decide whether the Court of Appeals erroneously determined that the trial court erred by denying defendant's motion to dismiss charges of felonious obstruction of justice and accessory after the fact to sexual activity by a substitute parent. After careful consideration of the record in light of the applicable law, we affirm in part and reverse in part the Court of Appeals' decision, and remand this case to that court to determine whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b).

I. Factual and Procedural Background

A. Factual Background

Defendant Mardi Jean Ditenhafer is the mother of Jane, born on 27 November 1996, and John, born in September 2004.[1] William Ditenhafer began living with defendant and Jane when Jane was five years old. When Jane was in the third grade, Mr. Ditenhafer adopted her. After Jane started middle school, defendant began working outside of the home during the week and was away from the home "almost . . . all day." As a result, Mr. Ditenhafer was left alone with Jane and John.

1. "Jane" and "John" are pseudonyms employed for ease of reading and the protection of the children's identities.

When Jane was in the eighth grade, she began e-mailing sexually suggestive pictures to a boy. After defendant and Mr. Ditenhafer learned about these images, defendant threatened to call the police if Jane engaged in similar conduct in the future.

When Jane was fifteen years old, defendant and Mr. Ditenhafer decided that Mr. Ditenhafer would give Jane weekly full-body massages for the ostensible purpose of improving her self-esteem. After one of these massages, Mr. Ditenhafer sent Jane to take a shower. As Jane walked to her room wearing only a towel following her shower, Mr. Ditenhafer called her into the living room, where he displayed additional sexually suggestive pictures that Jane had sent to the same boy as earlier, and told Jane that either he would show the new pictures to defendant or Jane could "help him with his . . . boner." Fearing he would tell her mom about the photos, Jane complied with his instructions to discard the towel and sit next to him; Mr. Ditenhafer then guided Jane's hand to his penis until he ejaculated.

After a couple of weeks of similar behavior, Mr. Ditenhafer began compelling Jane to perform oral sex upon him. Jane did not tell defendant about the abuse because she "didn't think [defendant] would believe [her] and [ ] would get angry at [her] for making up a lie." Once Jane reached the age of sixteen, Mr. Ditenhafer engaged in vaginal intercourse with her on multiple occasions.

During her ninth-grade year, Jane visited her aunt in Phoenix, Arizona. Jane told her aunt, Danielle Taber, that Mr. Ditenhafer had been sexually abusing her. When Jane and Ms. Taber called defendant to inform her about the ongoing abuse, defendant became angry at Jane. Even so, Ms. Taber called the local police, who began an investigation. On 9 April 2013, the Arizona law enforcement agency investigating Jane's allegations notified the Wake County Sheriff's Office about the sexual abuse that Jane was alleging.

Jane returned to North Carolina two days after her conversation with Ms. Taber. As they returned home from the airport, defendant told Jane that she did not believe her allegations and stated that Jane needed to "tell the truth and recant . . . because it was going to tear apart the family and it was just going to end horribly." Subsequently, defendant tried to have Jane admitted to a mental health facility and told John that "Your sister's crazy," and that the family "need[ed] to get her help."

In the aftermath of Jane's return to North Carolina, defendant continued to urge Jane to "tell the truth because [Jane] was tearing apart her family," warned that "[Mr. Ditenhafer] was going to go to jail because

of [her] lies," said that "[John] was going to turn into a drug addict and drop out of high school" because of what Jane was doing, and called Jane "a manipulative bitch." Defendant prevented Jane from talking to her Arizona relatives until Jane "called up [her] aunts and told them that [she] was lying." In addition, defendant threatened to call off a trip to Disneyland if Jane did not recant, stating that "Disney is not going to happen because we're going to lose our money" and that, "if you recant and tell the truth, . . . then we can go to Disney." In the same vein, defendant claimed that the family would "lose our stuff and the animals" if Jane did not recant. Finally, defendant told Jane that defendant might have breast cancer and that Jane "needed to stop this" because it was making the stress that she was experiencing as a result of her possible malignancy worse.

As a result of the ongoing investigation into Jane's allegations, Mr. Ditenhafer left the family home and Jane began meeting with Susan Dekarske, a social worker with the Wake County Child Protective Services Division of Wake County Human Services. Defendant was usually present or "in listening distance" during these meetings. On 21 June 2013, Detective Stan Doremus of the Wake County Sheriff's Office and Ms. Dekarske interviewed Jane at the family home. According to Detective Doremus, defendant had her hand on Jane's thigh "virtually the whole time." Detective Doremus indicated that Jane "didn't say a whole lot" because, "as soon as [she] opened her mouth to talk, Defendant would answer the questions." In the course of this interview, defendant told Detective Doremus and Ms. Dekarske that "there is some truth to everything that [Jane] is saying but not all of it is true."

On 11 July 2013, defendant allowed Jane to meet with Detective Doremus and Ms. Dekarske alone because defendant thought that Jane intended to recant her accusations against Mr. Ditenhafer. Prior to the meeting, defendant told Jane to tell Detective Doremus and Ms. Dekarske that she had "made it all up" because she "just wanted [Mr. Ditenhafer] out of the house" and "was just angry at everyone." At the meeting, however, Jane told Detective Doremus and Ms. Dekarske that "[m]y mom thinks I'm in here to recant, but I'm not because I'm telling the truth" and that she did not "know what to do because I can't take it at home anymore."

As the meeting progressed, defendant began sending text messages to Jane in which she inquired "what's going on, are you almost done[?]"As Detective Doremus and Jane discussed certain e-mails that Mr. Ditenhafer had sent Jane, defendant entered the room and interrupted the interview with a "smirk on her face." At that point, Detective

Doremus told defendant that "I'm not sure what you thought [Jane] was going to tell us, but she didn't recant" and showed defendant the e-mails that had been exchanged between Mr. Ditenhafer and Jane. In response, defendant became angry, stated that "it doesn't explain anything," and departed abruptly, taking Jane with her.

As a result of the pressure that she was receiving from various family members, including John, Jane decided to recant her accusations against Mr. Ditenhafer. In essence, Jane "didn't want to lose [John,] so [she] recanted."

On 5 August 2013, Ms. Dekarske went to the family home to conduct a regular home visit. As Ms. Dekarske was departing at the conclusion of the visit, Jane ran from the house and told Ms. Dekarske, "I just want to let you know I am recanting my story and I'm making it all up." Ms. Dekarske described Jane's recantation as "very robotic and boxed in" and stated that her comments appeared to have "been rehearsed for her to say."

On 7 August 2013, Jane called Detective Doremus while defendant listened on a separate line. According to Detective Doremus, it sounded as if two people were already talking when he answered the phone. Almost immediately, Jane stated, "I wish to recant my story." On 21 August 2013, Jane sent an e-mail to Detective Doremus that defendant had helped her to compose in which she recanted her accusations against Mr. Ditenhafer. As a result of this e-mail exchange, Detective Doremus set up a meeting with Jane.

On 29 August 2013, Mr. Doremus met with Jane at her school in an attempt to avoid any interruptions by or confrontations with defendant. At that meeting, Jane told Detective Doremus, "I can't talk to you. I need to call my mom. . . . I'm not talking to you." Jane then called defendant and told her about the meeting. Defendant later told Jane that she was proud of Jane for not saying anything to Detective Doremus.

As a result of Jane's recantation and various other factors, including defendant's desire for family reunification, Detective Doremus elected to refrain from charging Mr. Ditenhafer with committing any criminal offenses against Jane and Ms. Dekarske closed her child protective services investigation. Around Thanksgiving of 2013, Mr. Ditenhafer moved back into the family home.

Within a week after reentering the family home, Mr. Ditenhafer began sexually abusing Jane again. Jane did not tell defendant about Mr. Ditenhafer's actions because she did not think that defendant would

believe her. On 5 February 2014, Jane stayed home from school due to illness even though that meant that she would be alone in the house with Mr. Ditenhafer. On that date, Mr. Ditenhafer forced Jane to straddle him while he inserted his penis into her vagina; defendant entered the bedroom and saw what was happening. Defendant was upset and asked if this was Jane's "first time." Mr. Ditenhafer instructed Jane to tell defendant about her boyfriend. Jane told defendant that she and her boyfriend had previously had sexual intercourse. Jane thought defendant was more upset with her for having had sex with her boyfriend than she was about what she had witnessed Mr. Ditenhafer doing to Jane.

Later that day, on the way to retrieve Jane's cell phone from Detective Doremus, Jane told defendant, "What I said last year about the abuse is true . . . he has been abusing me, and that wasn't willingly. Sorry." Defendant replied, "I'm not sure if I believe you or not . . . I need to handle this first." Although defendant obtained Jane's phone from Detective Doremus, she did not inform Detective Doremus about the sexual abuse that she had just witnessed or otherwise report Mr. Ditenhafer's conduct to any law enforcement officer or child protective services worker. On the contrary, defendant told Jane to refrain from telling anyone about what Mr. Ditenhafer had done to her because "it was family business" and allowed Mr. Ditenhafer to remain in the family home for about a month after the abuse that defendant had witnessed occurred. In addition, defendant told Jane to "go into [defendant's] room, and . . . get the sheets and the pillow and the pillow case from the incident . . . and anything else that he might have used with [her]." Defendant and Jane tossed the items that Jane had retrieved from the bedroom into the backyard "because [they] had a boxer that liked to chew up and play with stuff" and threw "the rest of the stuff . . . away."

In March 2014, defendant told Mr. Ditenhafer's brother, Jay Ditenhafer, that she had walked in on Mr. Ditenhafer while he was having sexual intercourse with Jane and knew of "some pictures that had been passed between them." Although defendant claimed that she had thought about reporting Mr. Ditenhafer's conduct to the proper authorities, she told Jay Ditenhafer that she had decided not to do so because Mr. Ditenhafer and Jane had been separated "and there was no immediate danger[.]" In late April 2014, Jay Ditenhafer disclosed the information that he had received from defendant to Child Protective Services "because he did not feel that it was right for that to be happening and nothing was done about it."

On 29 April 2014, Robin Seymore, a Child Protective Services assessor with Wake County Human Services, interviewed Jane at her school.

As soon as the conversation began, Jane asked if defendant knew that Ms. Seymore was there. Upon being told that defendant did not know that their interview was taking place, Jane immediately asked, "Can I go out and talk to my mom? I want to call my mom first." Although Ms. Seymore allowed Jane to call defendant, defendant did not answer. According to Ms. Seymore, Jane seemed very anxious and kept saying "I want to call my mom. I need to talk to my mom," throughout the interview. When told of the information that Jay Ditenhafer had provided, Jane responded "that's not true, that's not true, none of that is true, none of that happened." Throughout the interview, Jane seemed "very antsy and just wanted [Ms. Seymore] to leave."

After conversing with Jane, Ms. Seymore went directly to John's school to interview him. As Ms. Seymore talked with John, defendant burst into the room, grabbed her son, and said, "Absolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening."

On 30 April 2014, defendant called Ms. Seymore and made arrangements to speak with her at the family home. Even though it was raining heavily, defendant would not allow Ms. Seymore and her supervisor to enter the house and insisted that the conversation take place outside. During the interview, defendant stated that although Mr. Ditenhafer came to the house on a daily basis to transport John to and from his school, he did not want to be around Jane in order "to avoid any more lies from [her]." Defendant told Ms. Seymore and her supervisor that she did not want them to go to the children's school any longer and that any conversations that they wished to have with the children should occur immediately outside the family home. At that point, in light of the allegations that Jane had made in 2013 and more recently, Wake County Human Services decided that Jane should be removed from the home.

On 1 May 2014, Detective Doremus, accompanied by other law enforcement officers and representatives of Child Protective Services, went to the family home to take Jane into protective custody and place defendant under arrest. Shortly after their arrival, Detective Doremus and those accompanying him observed defendant approach the family home in her vehicle, slow down, turn around in a neighbor's driveway, and depart in the opposite direction. At that point, Detective Doremus got into his vehicle, activated his blue lights, and pulled defendant over.

As Detective Doremus approached the vehicle, in which Jane and John were passengers, defendant closed her vehicle's windows, locked the doors, and began talking on her cell phone. Despite the fact that

Detective Doremus asked defendant to step out of the vehicle several times, defendant remained on the phone and did not comply with Detective Doremus's request. When Detective Doremus ordered defendant to get out of the car, defendant told Jane, "Don't say anything. Don't get out of the car. . . . If they try and take you away . . . don't go. Refuse to go. . . . [L]ower your arms. Run down the street. Just don't go."

Eventually, defendant complied with Detective Doremus's instructions. In return, Detective Doremus allowed defendant to drive herself back to the family home so that Jane could gather her belongings before entering into the custody of Wake County Human Services. Although Jane wanted to take her cell phone and laptop computer with her, defendant told her not to do so.

B. Procedural History

On 20 May 2014, the Wake County grand jury returned bills of indictment charging defendant with accessory after the fact to sexual activity by a substitute parent and felonious obstruction of justice. On 9 September 2014, the Wake County grand jury returned a superseding indictment charging defendant with accessory after the fact to sexual activity by a substitute parent in which the grand jury alleged that, "on or about February 5, 2014, in Wake County, the defendant named above unlawfully, willfully and feloniously did knowingly assist William George Ditenhafer in escaping detection, arrest or punishment by not reporting the incident after he committed the felony of Sexual Activity by a Substitute Parent." On 10 March 2015, the Wake County grand jury returned a superseding indictment charging defendant with two counts of felonious obstruction of justice, the second count of which alleged that, "on or about July 11, 2013 through September 1, 2013, in Wake County, the defendant named above unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud and obstruct an investigation into the sexual abuse of a minor to wit: the defendant denied Wake County Sheriff's Department and Child Protective Services access to her daughter, [Jane] (DOB : 11/27/1996), throughout the course of the investigation."

On 1 June 2015, after a trial, a jury returned verdicts convicting defendant as charged. After accepting the jury's verdicts, the trial court entered judgments sentencing defendant to a term of six to seventeen months imprisonment based upon defendant's first conviction for felonious obstruction of justice, a consecutive term of six to seventeen months imprisonment based upon defendant's second conviction for felonious obstruction of justice, and a consecutive term of thirteen to twenty-five

months imprisonment based upon defendant's conviction for accessory after the fact to sexual activity by a substitute parent. Defendant appealed to the Court of Appeals.

In the Court of Appeals, defendant argued, among other things,[2] that the trial court had erred by denying her motions to dismiss the charges for insufficiency of the evidence. *State v. Ditenhafer*, 812 S.E.2d 896, 903 (N.C. Ct. App. 2018). First, the Court of Appeals held that the trial court properly refused to dismiss the first count of felonious obstruction of justice based on an allegation that defendant had pressured Jane to recant.[3] *Id.* at 904. Second, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the felonious obstruction of justice charge based on the alleged denial of access to Jane. The Court of Appeals found error in that the State had "presented no evidence of a specific instance in which Defendant expressly denied a request by [the Wake County Sheriff's Department] or [Child Protective Services] to interview the daughter," that an attempt to distinguish between "access" and "full access" would "create an unworkable distinction in our jurisprudence," and that the conviction in question could not be upheld on the basis of other "acts of interference" given that such "conduct was not within the scope of the plain meaning of denying investigators 'access' to the daughter, as alleged in the indictment." *Id.* at 905. Finally, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the accessory after the fact charge given that the indictment failed to allege any criminal conduct on the part of defendant, instead alleging "a mere omission," which is "contrary to precedent." *Id.* at 907. The Court of Appeals declined to address whether other "affirmative acts" by defendant supported the accessory after the fact conviction given that "those activities [were] plainly beyond the scope of the charge stated in the indictment." *Id.* at 907. As a result, the Court of Appeals found no error in the entry of the trial court's judgment based upon the first of defendant's felonious

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2. In addition to the issues discussed in the text of this opinion, defendant argued that the trial court had erred by failing to instruct the jury that it could only convict defendant for accessory after the fact to sexual activity by a substitute parent on the basis of her alleged failure to report the abuse that had been inflicted upon Jane. As a result of its decision to reverse defendant's accessory after the fact conviction for insufficiency of the evidence, the Court of Appeals did not reach this aspect of defendant's challenges to the trial court's judgments.

3. As a result of the fact that defendant has not brought this claim forward for our consideration, we need not discuss any further in this opinion the sufficiency of the evidence to support the first of defendant's convictions for felonious obstruction of justice.

obstruction of justice convictions, but reversed the trial court's judgments based upon the second of defendant's felonious obstruction of justice convictions and defendant's accessory after the fact conviction.

Although she agreed with the Court of Appeals majority's decision to overturn the second of defendant's felonious obstruction of justice convictions based on denying investigators access to Jane, the dissenting judge disagreed with the decision to overturn defendant's accessory after the fact conviction based on failure to report the 5 February 2014 incident she observed. According to the dissenting judge, defendant's failure to report constituted an "unlawful omission for the purpose of assisting the perpetrator" that "satisfies the elements of the accessory offense." *Id.* at 908 (Inman, J., concurring in part and dissenting in part). In reaching this result, the dissenting judge relied upon her view that this Court's decision in *State v. Potter* "carved out an exception to" the general rule that neither the withholding of information nor a decision to falsely deny knowledge of a crime "constitutes the unlawful rendering of personal assistance to a felon in and of itself." *Id.* at 908 (citing *State v. Potter*, 221 N.C. 153, 156, 19 S.E.2d 257, 259 (1942)). According to the dissenting judge, "such conduct may rise to the level of personal assistance as an accessory when done 'for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear . . . .' " *Id.* at 908–09 (quoting *Potter*, 221 N.C. at 156, 19 S.E.2d at 259). Because defendant was legally obligated by N.C. Gen. Stat. § 7B-301 to disclose Mr. Ditenhafer's sexual abuse of Jane, defendant could be held criminally liable for failing to report it. *Id.* at 909.

The State appealed to this Court based on the dissenting opinion from that portion of the Court of Appeals' decision that reversed defendant's conviction for accessory after the fact. We allowed the State's petition for discretionary review of the Court of Appeals' decision reversing defendant's second conviction for felonious obstruction of justice by denying investigators access to Jane.

II. Analysis

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). Substantial evidence is the amount "necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In evaluating the

sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed in the trial court contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)).

B. Accessory After the Fact

[1] We affirm the Court of Appeals' holding reversing defendant's conviction as an accessory after the fact because: the indictment alleged that she did not report Mr. Ditenhafer's sexual abuse of Jane, a mere failure to report is not sufficient to make someone an accessory after the fact under North Carolina law, and we decline to consider any of defendant's other acts not alleged in this indictment.

The elements necessary to prove someone is an accessory after the fact are: "(1) a felony was committed; (2) the accused knew that the person [s]he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (citing *State v. Squire*, 292 N.C. 494, 505, 234 S.E.2d 563, 569 (1977); *Potter*, 221 N.C. at 156, 19 S.E.2d at 259).

Regarding the rendering assistance element, our decision in *Potter* announced two rules that are pertinent here. First, this court pointed out that an individual *cannot* be held to be an accessory after the fact when she, "knowing that a crime has been committed, *merely fails to give information thereof* . . . ." *Potter*, 221 N.C. at 156, 19 S.E.2d at 259 (emphasis added) (quoting 14 Am. Jur. *Criminal Law* § 103 (1938). Second, the court in Potter provided that an individual can be held to be an accessory after the fact when she "*conceal[s]* . . . knowledge of the fact that a crime has been committed, *or [gives] false testimony as to the facts* . . . ." *Id* (emphasis added). The key distinction is between the individual's actions and omissions. Under *Potter*, an individual can be

held to be an accessory after the fact only for her actions (such as concealment or giving false testimony), not for her omissions (like failure to report).

Here, defendant's superseding indictment only alleged that she became an accessory after the fact "by not reporting the incident . . . ." But as *Potter* made clear, the mere failure to give information of a crime she knows occurred is legally insufficient to establish the crime of accessory after the fact.

The dissent relies on *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982), to find that a parent's failure to report would violate her affirmative duty to "take all steps reasonably possible to protect the child from an attack by another person . . . ." 306 N.C. at 475–76, 293 S.E.2d at 786–87. The dissent would hold that, "in the event that a parent fails to report the commission of a crime against his or her child . . . because he or she intends to provide a specific personal benefit to herself, he or she can be held criminally liable as an accessory after the fact to the commission of a criminal offense by another person." This interpretation is a significant departure from *Walden*, where the defendant was prosecuted as a principal for the substantive offense of assault—that is, for the physical harm done to her child as a direct result of her failure to comply with her duty to protect her child from physical harm. Here, defendant was prosecuted as an accessory, not for the physical or emotional harm to her child, but for "assist[ing] William George Ditenhafer in escaping detection, arrest or punishment by not reporting the incident."

Further, assuming without deciding that some of defendant's other actions in this case may have amounted to "concealment" within the meaning of *Potter* such that defendant *could* have been charged as an accessory after the fact, we are unable to uphold her conviction on that basis because the State did not allege in the indictment that defendant committed any act other than failing to report a specific offense on or about a specific date, 5 February 2014. *See State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) ("This Court has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." (citing *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840–41 (1977))).

Accordingly, we affirm the decision of the Court of Appeals and hold that the trial court erred by failing to dismiss the charge that defendant was an accessory after the fact by failing to report Mr. Ditenhafer's sexual abuse of Jane.

C. Felonious Obstruction of Justice

[2] Because we conclude that the record—when taken in the light most favorable to the State—contains sufficient evidence to support defendant's conviction for felonious obstruction of justice based upon a denial of access to Jane, we reverse the Court of Appeals on this issue.

"At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (quoting 67 C.J.S. *Obstructing Justice* § 2 (1978)). If common law obstruction of justice is done "with deceit and intent to defraud" it is a felony. N.C.G.S. § 14-3(b) (2017); *see also State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342–43 (2014) ("The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud.")

Here, the record contains evidence tending to show that defendant talked over Jane during several interviews conducted by investigating officers and social workers in such a manner that Jane was precluded from answering the questions that were posed to her. Defendant told investigating officers and social workers that Jane had made false accusations against Mr. Ditenhafer. Defendant interrupted an interview, during which investigating officers and social workers were attempting to obtain information from Jane concerning the sexual abuse that she had experienced at the hands of Mr. Ditenhafer, by constantly sending Jane text messages and by abruptly removing Jane from the interview when she realized that Jane was not recanting her allegations. Defendant induced Jane to call Detective Doremus for the purpose of recanting her allegations against Mr. Ditenhafer and listened on the other telephone line while Jane did so. Similarly, defendant composed an e-mail that Jane sent to Detective Doremus in which she recanted her accusations. Defendant successfully induced Jane to refuse to speak with investigating officers and social workers, as evidenced by Jane's statement to Detective Doremus that "I can't talk to you. I need to call my mom," and her statement to Ms. Seymore that "I want to call my mom. I need to talk to my mom." Defendant insisted that Ms. Seymore interview Jane outside in the middle of a rainstorm by refusing to allow the interview to take place in the family home, insisted that Ms. Seymore refrain from speaking to Jane at her school, and demanded that all interviews with any family members be conducted outside the family home. On 1 May 2014, defendant fled from Detective Doremus with Jane and John, refused to unlock the doors of her automobile after Detective Doremus stopped it, and told Jane, "Don't say anything. Don't get out of the car.

. . . If they try and take you away . . . don't go. Refuse to go. . . . [L]ower your arms. Run down the street. Just don't go."

After giving "every reasonable intendment" and making "every reasonable inference" from the evidence in favor of the State, *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826, we conclude that the evidence here was sufficient "to persuade a rational juror" that defendant denied officers and social workers access to Jane throughout their investigation into Jane's allegations against Mr. Ditenhafer. *Id.* As a result, we reverse the Court of Appeals' holding that the evidence did not support defendant's conviction for felonious obstruction of justice based upon defendant's actions in denying access to Jane.

III. Conclusion

For the reasons set forth above, we affirm the Court of Appeals' decision to the extent that it held that the trial court erred by denying defendant's motion to dismiss the charge of accessory after the fact to sexual activity by a substitute parent. However, we reverse the Court of Appeals' decision to the extent that it held that the trial court erred by denying defendant's motion to dismiss the second of the two felonious obstruction of justice charges (denial of access to Jane), as set out in the superseding indictment. As a result, the Court of Appeals' decision is affirmed in part, reversed in part, and this case is remanded to that court to determine whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b).[4]

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice ERVIN concurring in part and dissenting in part.

Although I concur in the Court's determination that the record contains sufficient evidence, when taken in the light most favorable to the State, to support defendant's conviction for felonious obstruction of justice based upon a denial of access to Jane, I am unable to concur in its determination that the record fails to contain sufficient evidence to support defendant's conviction for accessory after the fact to sexual activity by a substitute parent. Instead, I believe that the trial court correctly denied defendant's motions to dismiss both of these charges for

4. This issue was raised in the Court of Appeals, but was not reached because that court found there was insufficient evidence to support defendant's conviction for obstruction of justice based on defendant's actions in denying access to Jane.

insufficiency of the evidence. As a result, I concur in the Court's opinion, in part, and dissent from its opinion, in part.

The elements of the crime of accessory after the fact are that: "(1) a felony was committed; (2) the accused knew that the person [s]he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (first citing *State v. Squire*, 292 N.C. 494, 505, 234 S.E.2d 563, 569 (1977); and then citing *State v. Potter*, 221 N.C. 153, 156, 19 S.E.2d 257, 259 (1942)).

> [T]o be an accessory after the fact one need only aid the criminal to escape arrest and prosecution. It is said that "this rule, however, does not render one an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof, nor will the act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact."

Potter, 221 N.C. at 156, 19 S.E.2d at 259 (quoting 14 Am. Jur. *Criminal Law* § 103, at 837 (1938)). Although the Court of Appeals, consistent with the result that the Court has reached in this case, determined that *Potter* criminalizes only "active conduct" and that "[m]erely concealing knowledge regarding the commission of a crime or falsifying such knowledge does not cause a person to become an accessory after the fact," *State v. Ditenhafer*, 812 S.E.2d 896, 906 (2018) (quoting *State v. Hicks*, 22 N.C. App. 554, 557, 207 S.E.2d 318, 320 *cert. denied*, 285 N.C. 761, 209 S.E.2d 286 (1974)), this analysis overlooks our subsequent statement that, "[w]here . . . the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact," *Potter*, 221 N.C. at 156, 19 S.E.2d at 259. Thus, while *Potter* does state that "merely fail[ing] to give information" is not sufficient to make one an accessory after the fact to the criminal conduct of another, it

also clearly indicates that such liability can be based upon defendant's "concealment of knowledge . . . for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused."[1] *Id.* at 156, 19 S.E.2d at 259. As the Court of Appeals has acknowledged, the basic principle enunciated in *Potter* "is applicable to situations where a person *merely fails to give information* of the committed felony or *denies knowledge* of the committed felony," with this limitation "made clear by the sentence in the text which immediately precedes the one quoted." *State v. Martin*, 30 N.C. App. 166, 170, 226 S.E.2d 682, 684 (1976).[2]

Consistently with this interpretation of *Potter*, this Court has recognized that, in certain instances, individuals can be held criminally liable for failing to take appropriate action to prevent the commission of unlawful conduct under certain circumstances. In *State v. Walden*, 306 N.C. 466, 476, 293 S.E.2d 780, 786–87 (1982), we upheld a defendant's conviction for felonious assault on an aiding and abetting theory based upon evidence tending to show that the defendant had failed to take action to prevent another person from assaulting and seriously injuring her child given that parents have an affirmative duty to protect their children from harm. In reaching this result, we recognized that "to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent"; that "this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute"; and that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed." *Id.* at

1. The Court appears to read *Potter's* reference to the "concealment of knowledge" to be limited to affirmative acts committed by a defendant for the purpose of precluding the discovery of the principal's unlawful conduct. *Potter*, 221 N.C. at 156, 19 S.E.2d at 259. However, I believe that the juxtaposition of the reference to "merely failing to give information," which seems to encompass simple silence unaccompanied by any other factor, with the reference to "concealment of knowledge," which focuses upon what one knows rather than what one does, suggests that finding a defendant guilty of accessory after the fact, based upon a failure to disclose and accompanied by the necessary mental state would be appropriate. *Id.*

2. Although the Court of Appeals suggested in *Martin*, 30 N.C App. at 170, 226 S.E.2d at 684, that the language quoted in the text is dicta, the relevant language from *Potter*, taken in its entirety, strikes me as a statement of the general principles upon which the Court relied in determining that the evidence was sufficient to support the defendant's conviction in that case.

475–76, 293 S.E.2d at 786–87 (first citing N.C.G.S. § 14-316.1; then citing *In re TenHooten*, 202 N.C. 223, 162 S.E. 619 (1932); and then citing *State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978)).

I recognize the risks that are associated with criminalizing omissions, such as the failure to report the commission of a criminal offense. However, the existing decisional law in this jurisdiction clearly contemplates such a result in a limited number of instances. At an absolute minimum, I am satisfied, after reading *Potter* and *Walden* in conjunction with each other, that, in the event that a parent fails to report the commission of a crime against his or her child to the proper authorities when the making of such a report is necessary in order to prevent future harm to the child and the parent fails to do so because he or she intends to provide a specific personal benefit to the perpetrator and to herself, he or she can be held criminally liable as an accessory after the fact to the commission of a criminal offense by another person.

As the record in this case clearly reflects, defendant caught Mr. Ditenhafer in the act of committing a serious sexual assault upon Jane. As of that point in time, defendant had no reasonable basis for doubting that Mr. Ditenhafer had engaged in a lengthy pattern of sexually abusing Jane, had direct knowledge that Mr. Ditenhafer had continued to sexually abuse Jane despite the disruption and risk that had been created by Jane's earlier accusations, and had every reason to believe that Mr. Ditenhafer's misconduct would continue unless defendant took affirmative action to bring it to an end. In addition, defendant had a clear legal obligation to protect her child, Jane, from future harm. The only way that defendant could have assured that Mr. Ditenhafer did not continue to sexually assault Jane would have been to report his conduct to the proper authorities, a step that defendant simply refused to take. As a result, defendant clearly had an obligation to report Mr. Ditenhafer's conduct to the proper authorities in order to comply with her legal duty to protect Jane from further harm and failed to do so.

In addition, a careful review of the evidence contained in the record developed at trial, when taken in the light most favorable to the State, clearly permits a determination that defendant acted for the purpose of providing a specific advantage to both Mr. Ditenhafer and herself.[3] For example, the State presented evidence tending to show that

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3. I do not believe that the use of acts other than those specified in the relevant count of the indictment for the purpose of shedding light on the intent with which and the purpose for which defendant failed to act in any way runs counter to the prohibition against allowing a defendant to be convicted upon the basis of a legal theory

defendant pressured Jane to recant the allegations that she had made against Mr. Ditenhafer by telling her that "[Mr. Ditenhafer] was going to go to jail because of [her] lies." In addition, defendant told Jane to refrain from reporting the abuse to which she had been subjected at the hands of Mr. Ditenhafer because "it was family business." Defendant told Jay Ditenhafer not to involve authorities and informed investigators that Jane's allegations were not true. Finally, even after catching Mr. Ditenhafer in the act of sexually abusing Jane, defendant participated in the destruction of the bed linens that might tend to evidence the abuse to which Jane had been subjected. As the dissenting judge in the Court of Appeals correctly noted, "the evidence of additional acts committed by [d]efendant . . . support[ed] a reasonable inference that her failure to report the abuse to law enforcement was for the purpose of helping her husband escape prosecution." *Ditenhafer*, 812 S.E.2d at 909–10 (Inman, J., concurring, in part. and dissenting, in part).

Similarly, the State presented ample evidence tending to show that defendant's failure to report the abuse that Jane had suffered at the hands of Mr. Ditenhafer was intended to provide a specific and direct benefit to defendant. Among other things, defendant stated that the investigation was "tear[ing] apart the family" and that a continued investigation "would cost them more money and time." Similarly, defendant told Jane that, if she did not recant her allegations against Mr. Ditenhafer, the family would "lose [their] money" and "lose their stuff and the animals." Finally, defendant told Jane that she needed to recant the allegations that she had made against Mr. Ditenhafer in order to alleviate the stress that defendant was experiencing and that this stress was exacerbating her possible breast cancer. Thus, the record contains ample evidence tending to show that defendant refrained from reporting the sexual abuse to which Jane had been subjected for defendant's own benefit as well. Based upon this logic, I believe that the Court of Appeals erred by holding that the record did not contain sufficient evidence to support defendant's accessory after the fact conviction and dissent from the Court's conclusion to the contrary, although I join in the remainder of its

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not alleged in the underlying criminal pleading. This issue typically arises only when the criminal offense in question is statutorily defined in such a manner that the defendant can be convicted on the basis of multiple legal theories, such as is the case with the offense of first-degree kidnaping. *See State v. Brown*, 312 N.C. 237, 247–48, 321 S.E.2d 856, 862–63 (1984) (holding that the trial court erred by allowing the defendant to be convicted of first-degree kidnaping in the event that the defendant acted "for the purpose of terrorizing" the victim even though the indictment alleged that the defendant acted "for the purpose of facilitating the commission of a felony, to wit: attempted rape").

opinion. As a result, I concur in the Court's decision, in part, and dissent from its decision, in part.

Justice NEWBY joins in this separate opinion.

STATE OF NORTH CAROLINA
v.
BRANDON MALONE

No. 379A17

Filed 1 November 2019

Identification of Defendants—impermissibly suggestive identification procedures—photographs and video of defendant—likelihood of misidentification—independent origin

The State employed impermissibly suggestive identification procedures with two murder eyewitnesses by showing them photographs and a police interview video of defendant just days before defendant's murder trial. But one of those witnesses had identified defendant as the shooter long before the impermissible identification procedures, so those procedures did not create the risk of misidentification, and that witness's in-court identification of defendant was properly admitted and did not violate defendant's due process rights.

Justice ERVIN concurring in the result in part and dissenting in part.

Justices NEWBY and HUDSON join in this separate opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 256 N.C. App. 275, 807 S.E.2d 639 (2017), finding prejudicial error upon appeal from judgments entered on 7 April 2016 by Judge James K. Roberson in Superior Court, Alamance County. On 1 March 2018, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court on 9 April 2019.

Joshua H. Stein, Attorney General, by Jess D. Mekeel, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellee.

EARLS, Justice.

At approximately 6 p.m. on 23 October 2012, twenty-two year old Anthony Kevette Jones was shot and killed on the front porch of his mother's home in Burlington in a confrontation with two men. One of those men was identified soon after the shooting as Marquis Spence. The identity of the other man, who carried the gun and pulled the trigger, was the central issue in the trial of defendant Brandon Malone. Following a two-week trial, Mr. Malone was convicted of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, he argued that the trial court erred in denying his motions to suppress the testimony of two eyewitnesses, Claudia Lopez and Cindy Alvarez, including their in-court identifications of defendant as the perpetrator of the crimes. In a divided opinion, the Court of Appeals majority agreed, concluding that the eyewitness testimony at issue was the result of identification procedures that were impermissibly suggestive in violation of defendant's due process rights and that the testimony was prejudicial to defendant, requiring a new trial. *State v. Malone*, 256 N.C. App. 275, 291–95, 807 S.E.2d 639, 651–53 (2017). We affirm in part and reverse in part. The Court of Appeals was correct in holding that the identification procedures at issue here were impermissibly suggestive, but we conclude that they ultimately did not violate defendant's statutory or due process rights because Cindy Alvarez's identification of defendant was of independent origin, based on what she saw at the time of the shooting.

Background

The sun was still shining on the early fall evening in Burlington when a neighbor's security camera recorded two men pulling up to the house across the street in a blue car and exiting. Less than two minutes later, the same two men are seen in the video running back to the car, getting in and driving off in haste. Although there were several people on the porch at the time Mr. Jones was fatally shot, no eyewitness to the shooting was able to identify defendant Malone within the first few days of the murder. Witnesses agreed that during the confrontation, one of the two men who had arrived in the blue car drew a handgun and fired multiple shots, killing Mr. Jones and wounding another man, Micah White. In the hours following the shooting, police focused their investigation on Marquis Spence, who was identified by eyewitnesses immediately

afterwards, and defendant, who witnesses said was with Mr. Spence within two hours before the shooting.

Upon being arrested two days after the murder, defendant submitted to a three- to four-hour police interview without counsel in which he maintained that he was not in Burlington on October 23rd. The only direct evidence that defendant was the man who shot Jones and White was the courtroom testimony of two women who did not know him but who were on the porch of the house at the time of the shooting, Claudia Lopez and her friend Cindy Alvarez. Other circumstantial evidence was submitted by the State, including the testimony of witnesses who placed defendant in the blue car with Mr. Spence earlier that day. They also testified that he was part of the drug transaction alleged to have led to the shooting.

The State's theory of the case, based on various witness' testimony, is that Spence and Malone, who lived on the same street in Durham, were virtually inseparable drug dealers. On the afternoon in question, they arranged to purchase "a pound of weed" for $1,200 from Mr. Jones and another man, Jared "Skip" Alston. Mr. Malone gave Skip the money, expecting him to return in five minutes with the drugs. However, true to his name, Skip disappeared. Three women from Durham testified to being present during some or all of these events, Calen Burnette, Arianna McCray, and Lakreisha Shoffner. After efforts to locate Skip were unsuccessful, the three women drove separately to Skip's house while Spence and Malone told the women not to worry, and that they were "going back to Raleigh to make some money."

When the blue car driven by Mr. Spence pulled up outside Mr. Jones's house in Burlington just before 6 p.m. that evening, Mr. Jones was sitting on the steps. Claudia Lopez was sitting on the arm of a chair approximately ten feet from Jones, and Cindy Alvarez was sitting in a chair approximately five to six feet from the shooter. Also on the porch were Skip's brother Jordan, and the other victim, Micah White. Tabias Sellars, Marcus Clayton and Gavin Jackson had just gone inside the house. Two men exited the car and approached the steps. A short conversation ensued between the driver and Jones concerning Skip's location. When Mr. Jones said that he did not have a phone number for Skip, four to six shots were fired, and the two men ran back to the blue car and fled the scene.

Eyewitness Identifications in 2012

Police arriving at the home shortly after the shooting spoke with witnesses. Micah White initially said he did not know which man had the

gun, the driver or the passenger. Claudia Lopez told police at the scene that "she saw one of the guys' hand in his pocket, could not remember which one, but could see a silver part of a gun." She also said, referring to the shorter man, that she "did not remember . . . any features of him." Cindy Alvarez told the officer on the scene that the shooter had dark freckles.

Two days after the shooting, Burlington Police prepared and administered two photo lineups to witnesses, one including a picture of Marquis Spence and one with a picture of Brandon Malone. Of the eyewitnesses to the shooting, Claudia Lopez identified Mr. Spence as the man who spoke with Mr. Jones with confidence of 8 out of 10. She did not identify Mr. Malone. Upon viewing the lineup a second time, Ms. Lopez "paused" at Mr. Malone's photo and said "That looks like him, but I'm not sure." The record of the photo lineup indicates no positive identification made by the witness. Cindy Alvarez identified Mr. Spence as "the one who shot Kevette" with confidence of 8 out of 10. She did not recognize Mr. Malone's photo at all and identified an entirely different photo as someone who "looks like" the man who accompanied the shooter, but she stated she was not sure because she "focused on [the] shooter because he had his hand in his pocket the whole time." Approximately a week or two after the shooting, Cindy Alvarez saw a photo of defendant on Facebook and was immediately certain "that that was the guy that shot Kevette." Ms. Lopez saw the same photo, but did not recognize defendant. Micah White, who was shot in the ankle, was unable to make a positive identification of either Mr. Spence or Mr. Malone when shown a photo lineup.

Subsequent Proceedings

On 5 November 2012, defendant was indicted for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.[1] For three and a half years, the eyewitnesses had no contact with law enforcement. On 29 February 2016, approximately two weeks before the trial of this case was set to begin, Iris Smith, a legal assistant at the District Attorney's office, asked Lopez and Alvarez to come to the old courthouse in Burlington where the District Attorney's office was located, to "confirm [their] identification of Malone." Alvarez testified that "They wanted to make sure that I was – I was – I mean, that I was saying who really – like, who is who. Like, if I recognized them." Smith testified that "I told them I had pictures I wanted them to look

1. Defendant was subsequently indicted for discharging a weapon into occupied property. That charge was dismissed at the close of the State's evidence.

at, updated pictures of the defendants." Smith also gave both witnesses copies of their video-recorded police interviews. Smith showed them current photos of Malone and Spence, and asked Lopez and Alvarez if they recognized them. According to Ms. Alvarez's courtroom testimony, when she saw Mr. Malone's picture that day, she pointed to him and said that "he's the one that killed Kevette."

Ms. Alvarez was upset about having to go through a trial and asked Iris Smith what Mr. Malone was saying about the incident. Ms. Smith mentioned Mr. Malone's police interview and Ms. Alvarez asked to see it. They moved to another room in the courthouse, and Ms. Lopez sat down because she was having health issues. Ms. Alvarez was standing near a window as the women waited for the video interview to load. Ms. Smith showed Lopez and Alvarez somewhere between two to five minutes of the video of Mr. Malone's police interview. At some point Ms. Alvarez looked out the window and said "that's him, that's the guy that shot Kevette." The other two women also came to the window and watched Mr. Malone, in prison clothes and handcuffs, being escorted by a police officer from a police car and into the courthouse. Mr. Malone was in court that day for a hearing in his case. After that the witnesses left and Ms. Smith went in the court for the hearing. Ms. Alvarez told defendant's investigator that she went to the door of the courtroom, looked through the glass, and "looked into the courtroom while he [Malone] was inside the courtroom."

On 12 March 2016, defendant filed motions to suppress identification evidence from two eyewitnesses to the shooting, Claudia Lopez and Cindy Alvarez, arguing that the State subjected the witnesses to impermissibly suggestive identification procedures. On 14 March 2016, the trial court held a hearing on defendant's motions to suppress. The State called several witnesses at the hearing, including Lopez and Alvarez. In denying defendant's suppression motion, the trial court made extensive oral findings of fact, including:

> That Claudia Lopez was ten feet away from Mr. Jones when he was shot. That Cindy Alvarez was four feet from the shooter when Mr. Jones was shot. [Ms. Lopez] and [Ms. Alvarez] each gave some description of the two males giving some information about clothing. [Ms. Lopez] also described that the shooter had on a white T-shirt with shoulder length hair and the speaker had [a] body piercing.
>
> On [25 October] 2012, the Burlington Police Department conducted an identification procedure with [Ms. Lopez]

and with [Ms. Alvarez]. Those procedures involved photographic arrays, sometimes referred to by the officer as photo line-ups.

In one array the Burlington Police Department used a photo of Marquis Spence, who's a charged co-defendant in . . . connection with this matter. So [they] used a photo of Marquis Spence and seven fillers. Filler being seven folks who are not involved or have been excluded from involvement in the incident under investigation.

In the other array the Burlington Police Department used a photo of [Defendant] and seven fillers.

The Burlington Police Department did not use a current photo of . . . [D]efendant as reflected the current photo being introduced into evidence as State's Exhibit No. 3. In part, because the background in the photo was different from others and that there was some concern about that causing . . . [D]efendant's photo to stand out in the array.

Further, Marquis Spence's current photo showed him with an eyebrow body piercing and Burlington Police Department made the decision to attempt to locate a photo without such piercing being in the photo so as not to cause Marquis Spence's photo to stand out.

In . . . [D]efendant's current photo he had an unusual expression on his face as interpreted by the officer that the Burlington Police Department thought might make it stand out.

The Burlington Police Department instead used an older photo of . . . [D]efendant obtained from the Division of Adult Correction website. In the photo that the Burlington police used . . . [D]efendant's hairstyle, which the officer characterized as being plats, was different from the hairstyle in the current photo, which the officer characterized as dreadlocks. So the older photo had plats. Current photo dreadlocks.

[Ms. Lopez] identified [number four] Marquis Spence in the array involving that co-defendant.

At [the] hearing she referred to that identified person as the male who did the talking. She reported her level of

confidence on that identification as an eight on a scale of one to ten.

On the second array, [Ms. Lopez] indicated that [number six], which was . . . [D]efendant, looked like him but she was not sure and she initialed that she had not—did not have a positive [identification].

[Ms. Alvarez identified number six], which was Marquis Spence. She indicated she had an 80% level of confidence and 100% if he had long dreads, and added that . . . looked like the one that shot Kevette. So she identified Marquis Spence in that connection.

[Ms. Alvarez] in the second array identified [number seven]. This is the array that in which . . . [D]efendant's photo was located. [She] [i]dentified [number seven] who is an individual named Danny Lee Johnson whose photo was included as a filler. But she indicated that she was not sure. She noted she focused on the shooter because he had his hands in his pocket the whole time.

[Ms. Lopez] and [Ms. Alvarez] each saw photos of . . . [D]efendant and Marquis Spence in the online newspaper. These photos were not among those that were shown to each of them by the Burlington Police Department in the arrays. No law enforcement officer showed either [Ms. Lopez] or [Ms. Alvarez] anymore photos other than the ones shown during the course of the arrays.

. . . [W]hen [Ms. Alvarez] saw the online newspaper photos of . . . [D]efendant and Marquis Spence, she thought to herself that these photos showed how they looked on the day of the shooting.

Further, she thought that the photo of [D]efendant was of the person who shot Kevette.

[Ms. Lopez] and [Ms. Alvarez] each went several years without contact from the District Attorney's office or contacting the District Attorney's office or without any further interaction with law enforcement in connection with all these events.

Each had contact with Iris Smith, victim witness legal assistant with the Alamance County District Attorney's office in February of 2016 as trial date approached.

[Ms. Lopez] and [Ms. Alvarez] each knew that there was going to be a hearing in this case on [29 February] 2016, at the Alamance County Historic Courthouse. Neither knew . . . whether . . . [D]efendant would be present at the hearing. Iris Smith arranged to meet with each on [29 February] in the furtherance of her trial preparation duties. Because [Ms.] Smith was at the Historic Courthouse attending to grand jury matters, she advised [Ms. Lopez] and [Ms. Alvarez] . . . to meet her at the District Attorney's office in that building.

Smith gave [Ms. Lopez] and [Ms. Alvarez], a copy of her respective statement to officers and showed them photos she had obtained of . . . [D]efendant and Marquis Spence off of the Internet.

Up to the point when [Ms.] Smith downloaded the Internet photos, the only photos in the [District Attorney]'s file were the ones used in the photo arrays done by the Burlington Police Department some years earlier.

The . . . photos shown by Smith on [29 February] were the same photos that each [Ms. Lopez] and [Ms. Alvarez] had already seen in the online newspaper some time earlier.

[Ms.] Smith also began showing each a video of . . . [D]efendant's statement to law enforcement officers. [Ms. Lopez] was seated at the time. [Ms. Alvarez] was standing near the window of the room in which they were meeting.

[Ms. Alvarez] then stated, there he is, the one who shot Kevette. [Ms. Lopez] and [Ms.] Smith got up and went over to the window. At that time . . . [D]efendant was exiting alone from a patrol unit parked adjacent to the Historic Courthouse, accompanied by a law enforcement officer, dressed in an orange jumpsuit and in handcuffs.

[Ms. Lopez] testified in court that she believed that [D]efendant was the person who shot Kevette and based on the events at the scene of the shooting and not the viewing of the photos at the District Attorney's office on [29 February] or the viewing of . . . [D]efendant exiting the law enforcement unit on that day or the statement that [Ms. Alvarez] made about . . . [D]efendant as he exited the unit.

> [Ms. Alvarez] testified in court that her identification of . . . [D]efendant was based on the events surrounding the shooting and not on the [29 February] 2016, events in the [District Attorney's] office.
>
> Neither [Ms. Lopez] nor [Ms. Alvarez] knew . . . [D]efendant nor Marquis Spence prior to the date of the shooting. Assistant District Attorney Alex Dawson, the [prosecutor] in this case, was not present during the meeting on [29 February] 2016, at the Historic Courthouse.
>
> Counsel are in near agreement, . . . that the amount of time that [Ms. Alvarez] and [Ms. Lopez] were in a position to observe the two males and the shooting was from 75 to 90 seconds. So I took that matter as not being in dispute . . . .

Turning to whether the witnesses' in-court identifications of defendant were reliable and of independent origin, the trial court made additional findings:

> One of the first factors [in determining whether an identification is of independent origin] is the opportunity to view the crime. The [c]ourt finds that the time that [Ms. Lopez] and [Ms. Alvarez] had to view the two males and the shooting was a short period of time from 75 to 90 seconds.
>
> The [c]ourt does find that the event was a startling event, one that would claim your attention or cause you to pay no attention and flee from the situation.
>
> That [Ms.] Lopez was within ten feet of the shooter on the porch where Mr. Jones was shot and when he was shot and [Ms.] Alvarez was four feet from Mr. Jones when he was shot. That's the opportunity to view. They were all on the porch together.
>
> [As to] [t]he degree of attention[,] [t]he [c]ourt finds that the two indicated that they were paying attention to the two males that came up and to Mr. Jones. The event was a startling event, one that would cause the event to stand out in their minds; that they gave a general description of clothing, hair and body piercing and the car and indication of who was driving the vehicle and who was the passenger in the vehicle.

> As to the accuracy of prior description . . . [Ms.] Lopez described the shooter as having shoulder length hair. . . . [D]efendant had shoulder length hair at or around the time of the shooting. At the arrays of the Burlington Police Department [Ms. Lopez] identified Marquis Spence as the main talker. . . . also being the driver of the vehicle. And [she] was not sure about . . . [D]efendant as the shooter and did not make a positive [identification]. She did linger over . . . [D]efendant's photo during the course of the array.
>
> [Ms. Alvarez] identified Marquis Spence as the shooter and did not pick . . . [D]efendant as the other person [instead] picking a completely unassociated individual.
>
> [As to] [t]he level of certainty demonstrated at the confrontation, . . . [Ms. Alvarez] and [Ms. Lopez] had seen these photos before so they were not new photos. . . . [Ms.] Alvarez had recognized the photos as the two males as they looked at or around the time of the shooting.
>
> . . . [Ms. Lopez] and [Ms. Alvarez] each recognized . . . [D]efendant as he exited the law enforcement unit. Both appeared confident in their identifications during that event . . . .
>
> [In regard to] [t]he length of time between [the] crime and [the] confrontation[,] [t]here [were] approximately three and a half years between the shooting and the [29 February] event. . . .

Based on these and other findings of fact, the trial court denied defendant's motion to suppress, concluding that the events on 29 February 2016 during which Ms. Lopez and Ms. Alvarez saw photographs of Malone, viewed portions of his videotaped interview, and saw him being led into the courthouse by police were "not impermissibly suggestive." The court further concluded that "based on the testimony of the two witnesses, Claudia and Cindy, in the courtroom, that those identifications are of independent origin."

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury and first degree murder on the basis of both premeditation and deliberation and the felony murder rule. The trial court imposed concurrent sentences of life without parole for the murder and 83 to 112 months for the assault. Defendant gave notice of appeal.

At the Court of Appeals, defendant challenged the trial court's denial of his motions to suppress, arguing that the 29 February meeting constituted an impermissibly suggestive identification procedure in violation of his due process rights and the Eyewitness Identification Reform Act (EIRA). *See* N.C.G.S. §§ 15A-284.50 to -284.53 (2017). The Court of Appeals agreed, determining first that the trial court erred in concluding that the pretrial identification procedures were not impermissibly suggestive:

> The evidence admitted at trial demonstrates after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of Defendant or positively identify Defendant. Then, nearly three and a half years later and approximately two weeks prior to trial, the witnesses met with Smith, viewed a video of Defendant's interview, surveillance footage of the incident, and more recent photographs of Defendant. It is likely the witnesses would assume Smith showed them the photographs and videos because the individuals portrayed therein were suspected of being guilty.

Malone, 256 N.C. App. at 291, 807 S.E.2d at 650. Additionally, after identifying that several of the trial court's findings of fact were not supported by competent evidence, the court determined that the trial court erred in concluding that the in-court identifications of defendant were of independent origin, stating:

> The short amount of time the witnesses had to view Defendant, their inability to positively identify Defendant two days after the incident, and their inconsistent descriptions demonstrate it is improbable that three and a half years later they could positively identify Defendant with accuracy absent the intervention by the District Attorney's office.

Id. at 293, 807 S.E.2d at 651. The Court of Appeals concluded that because the 29 February meeting constituted impermissibly suggestive identification procedures and because the in-court identifications were not of independent origin, the procedures violated defendant's due process rights. *Id.* at 293, 807 S.E.2d at 651. Finally, the court determined that the impermissible identification procedures were not harmless beyond a reasonable doubt and therefore were prejudicial to defendant, requiring a new trial. *Id.* at 294–95, 807 S.E.2d at 652–53.

One member of the panel dissented, opining first that there was no error in the admission of Ms. Alvarez's in-court identification because it had an independent origin. *Id.* at 296, 807 S.E.2d at 653 (Dillon, J., dissenting). Next, the dissenting judge stated that any error in admitting the in-court identification of Ms. Lopez was harmless beyond a reasonable doubt in light of the other evidence against defendant. *Id.* at 296–97, 807 S.E.2d at 653–54. Accordingly, the dissenting judge concluded that there was "no reversible error." *Id.* at 296, 807 S.E.2d at 653.

On 11 December 2017, the State filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2). Additionally, the State filed a petition for discretionary review of additional issues, which the Court allowed. In its petition, the State asks this Court to correct what it contends is the majority's flawed interpretation of the EIRA in dicta, namely that "all eyewitness identification procedures should comply with the requirements of the EIRA" even though here the disputed procedures were conducted by a legal assistant and by its terms, the EIRA applies to law enforcement officers.

Standard of Review

Our review of the denial of a motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). "The trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096 (1995)), *cert. denied*, 139 S. Ct. 1279 (2019). A trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982).

However, the trial court's conclusions of law are fully reviewable on appeal. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citing *State v. Mahaley*, 332 N.C. 583, 592–93, 423 S.E.2d 58, 64 (1992)), *cert. denied*, 512 U.S. 1254 (1994). Similarly, this Court reviews the decision of the Court of Appeals for any error of law. *Brooks*, 337 N.C. at 149, 446 S.E.2d at 590 (citations omitted). Furthermore, we agree with the Court of Appeals that the extent to which a witness's in-court identification has an independent origin is a question of law or legal inference

rather than a question of fact. *See State v. Pulley*, 180 N.C. App. 54, 65, 636 S.E.2d 231, 240 (2006).

Analysis

I. Due Process Claim

The governing law applicable to the issues before us in this case is well-established. As a general proposition, "the jury, not the judge, traditionally determines the reliability of evidence." *Perry v. New Hampshire*, 565 U.S. 288, 245, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694, 711 (2012). However, due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct. *Id.* at 248, 132 S. Ct. at 730, 181 L. Ed. 2d at 713. The initial inquiry in which a reviewing court is required to engage in conducting such a due process inquiry is "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 697–98 (2001) (citing *U.S. v. Marson*, 408 F.2d 644, 650 (4th Cir. 1968); *State v. Simpson*, 327 N.C. 178, 186, 393 S.E.2d 771, 776 (1990); *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984)). In order to make the relevant determination, the Court must utilize a two-step process, with the first step requiring the Court to "determine whether the identification procedures were impermissibly suggestive," *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (citing *State v. Powell*, 321 N.C. 364, 368–69, 364 S.E.2d 332, 335 (1988); *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978)), and with the second step, which becomes relevant in the event that "the procedures were impermissibly suggestive," requiring the Court to determine "whether the procedures create a substantial likelihood of irreparable misidentification." *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (citing *Powell*, 321 N.C. at 369, 364 S.E.2d at 335; *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *Headen*, 295 N.C. at 493, 245 S.E.2d at 708). Even if the witness was subjected to impermissibly suggestive identification procedures, that witness's in-court identification testimony may still be admissible in the event that the trial court finds "that the in-court identification has an origin independent of the invalid pretrial procedure" because, in that case, the procedures have not created a substantial likelihood of irreparable misidentification. *State v. Bundridge*, 294 N.C. 45, 56, 239 S.E.2d 811, 819 (1978) (citing *U.S. v. Wade*, 388 U.S. 218, 242, 87 S. Ct. 1926, 1940, 18 L. Ed. 2d 1149, 1166 (1967); *State v. Henderson*, 285 N.C. 1, 12, 203 S.E.2d 10, 18 (1974)); *see also Powell*, 321 N.C. at 369, 364 S.E.2d at 336 (upholding a trial court determination that "the in-court

identification of the defendant was of independent origin and untainted by illegal pretrial procedures"); *State v. Harris*, 308 N.C. 159, 166, 201 S.E.2d 91, 96 (1983) (holding that, "[e]ven assuming arguendo that the pretrial photographic lineup procedure could be found impermissibly suggestive, we find more than adequate evidence to support the trial court's decision to hold [the witness's] in-court identification admissible as being of independent origin"); *State v. Thompson*, 303 N.C. 169, 172, 277 S.E.2d 431, 434 (1981) (finding "adequate evidence in the record to support the trial court's decision holding the in-court identification admissible as being of independent origin").

In determining whether the witness's in-court identification had the necessary independent origin, a court should consider "the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation." *Thompson*, 303 N.C. at 172, 277 S.E.2d at 434 (citing *Neil v. Biggers*, 409 U.S. 188, 200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1971); *Headen*, 295 N.C. at 437, 245 S.E.2d at 706). It is not necessary for the Court to find that all five of the relevant factors militate in favor of a finding of independent origin in order to admit a witness's in-court identification into evidence despite the fact that impermissibly suggestive identification procedures had taken place during the investigative process. *Powell*, 321 N.C. at 370, 364 S.E.2d at 336. However, "[a]gainst these factors must be weighed the corrupting effect of the suggestive procedure itself." *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)).

We first consider whether the procedures were impermissibly suggestive. The partial concurrence suggests that we should not address this issue. However, it is the first part of a two-part test. We have stated that "[t]his due process analysis requires a two-part inquiry. *First, the Court must determine* whether the identification procedures were impermissibly suggestive." *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (emphasis added); *accord State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002). We are not required to skip part of the analysis. *See State v. Knight*, 282 N.C. 220, 226–27, 192 S.E.2d 283, 287–88 (1972) (concluding first that identification procedure was impermissibly suggestive and then determining it was of independent origin); *but see Powell*, 231 N.C. at 369, 364 S.E.2d at 336 (assuming *arguendo* that procedures

were impermissibly suggestive and continuing to the second part of the inquiry). Thus, while the partial concurrence "do[es] not believe that there is any need for the Court to address the issue of whether Ms. Alvarez was subjected to impermissibly subjective identification procedures," our precedents suggest that we should. The independent origin inquiry, on which both our and the partial concurrence's conclusions are based, is merely the second part of the due process inquiry.[2]

On the first question, the Court of Appeals correctly examined the trial court's findings of fact and found that they did not support the conclusion of law that the procedures used were not impermissibly suggestive. In particular, Ms. Smith's actions in showing Lopez and Alvarez the video of Mr. Malone's interview and recent photographs of Malone and Spence are exactly the kind of highly suggestive procedures that have been widely condemned as inherently suggestive. *See Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972–73, 18 L. Ed. 2d 1199, 1206 (1967); *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194 (1981). The U.S. Supreme Court has held that single-suspect identification procedures "clearly convey[ ] the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234, 87 S. Ct. at 1936, 18 L. Ed. 2d at 1161. Here, Ms. Smith did more than simply convey a suggestion. "[I]n the furtherance of her trial preparation duties," she effectively told Lopez and Alvarez that they were viewing pictures of the men police believed were responsible for the shooting by "show[ing] them photos she had obtained of the defendant and Marquis Spence" in a meeting two weeks before trial.

The State contends that this was not an "identification procedure" because Ms. Smith was only engaging in witness preparation in anticipation of their upcoming trial testimony and that Ms. Smith only showed them the video of Mr. Malone's interview because Ms. Alvarez asked to see it. Neither Ms. Lopez nor Ms. Alvarez identified Mr. Malone when

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2. The partial concurrence is, of course, correct that we generally "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416 572 S.E.2d 101, 102 (2002). However, the constitutional question here is whether due process requires the suppression of eyewitness identification evidence. Our precedents identify this as a two-part inquiry, and by addressing, rather than assuming, the first and logically necessary part of the test, we provide useful guidance on what constitutes an unnecessarily suggestive identification procedure. Moreover, given that the trial court held that the procedures were not impermissibly suggestive, we should explain why we disagree rather than simply "assume" the opposite.

shown a photo lineup two days after the shooting. Further, Ms. Alvarez identified someone other than Mr. Malone as the shooter and picked an entirely different "filler" person as the second person involved. After that, as found by the trial court, "[n]o law enforcement officer showed either Claudia or Cindy anymore photos other than the ones shown during the course of the arrays. . . . [E]ach went several years without contact from the District Attorney's office or contacting the District Attorney's office or without any further interaction with law enforcement in connection with all these events." Under these circumstances, for Lopez and Alvarez to be shown pictures and a videotaped interview, even for just a few minutes, of the person now on trial for murder goes far beyond the line where trial preparation ends and witness coaching begins. The facts as found by the trial court in this case lead inescapably to the legal conclusion that the procedures employed by the District Attorney's office on 29 February 2016 were impermissibly suggestive.

To be clear, our conclusion that impermissibly suggestive procedures were used in this case is based on the photographs and video of Mr. Malone that Ms. Lopez and Ms. Alvarez viewed a few days before trial.

Although an impermissibly suggestive identification procedure was used during the 29 February 2016 meeting between Ms. Smith, Ms. Lopez, and Ms. Alvarez, the second question is whether the procedure gave rise to a substantial likelihood of irreparable misidentification. On this second question we disagree with the majority below because the trial court's findings of fact support the legal conclusion that Ms. Alvarez's in-court identification of defendant was of independent origin and sufficiently reliable.

We examine the five factors set out in *State v. Pigott*, 320 N.C. at 99–100, 357 S.E.2d at 634, as to each witness, namely the opportunity of the witness to view the defendant at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the defendant, the level of certainty demonstrated by the witness at the time of the confrontation, and the time between the crime and the confrontation. The trial court's findings with respect to independent origin begin with the witnesses' opportunity to view the crime. Here there are some differences between the two eyewitnesses. While both had the same "short period of time from 75 to 90 seconds" within which to view the two males and the shooting, Ms. Alvarez was much closer, just four feet, from Mr. Jones when he was shot while Ms. Lopez was within ten feet of

the shooter on the porch. This factor supports a finding of independent origin for Ms. Alvarez, and does so more strongly than for Ms. Lopez.[3]

Similarly, as to degree of attention, the trial court found that Ms. Alvarez and Ms. Lopez "indicated that they were paying attention." The trial court's finding was supported by the evidence, at least as to Ms. Alvarez. Ms. Alvarez stated that she was "paying attention to him the minute he got out of the car." Asked why, she said it was because "he had his hands in his pocket the whole time. One of his hands in his pocket the whole time. He wasn't really speaking. He wasn't saying nothing. And for some reason, like, I was just focused on him the whole time." In contrast, Ms. Lopez, when asked what she remembered of the person who actually fired the gun, responded that "[h]im specifically, his face, um, I was in shock, like I said, that day so the only thing I remember him about is his hair, that it was about this long." Later she testified "I never really paid much attention to his face because the whole time he was standing in front of us he just had his hand in his pocket." This factor again supports a finding of independent origin as to the in-court identification by Ms. Alvarez and does so more strongly than for Ms. Lopez.

Regarding the accuracy of the prior description, the trial court made the following findings of fact as to Ms. Lopez: (1) Ms. Lopez described the shooter as having shoulder-length hair, (2) Ms. Lopez identified Marquis Spence as one of the two suspects, particularly as the person who did not shoot Mr. Jones, and (3) although she lingered over defendant's photo during the photo lineup, she did not identify defendant or anyone else in the lineup as the second suspect who had shot Jones. The trial court made the following findings as to Ms. Alvarez: (1) Ms. Alvarez identified Marquis Spence as one of the two suspects, particularly as the person who *did* shoot Mr. Jones, (2) Ms. Alvarez did not identify defendant as the second suspect when presented with a photo lineup, and (3) Ms. Alvarez identified a "completely unassociated individual" as the second suspect when presented with a photo lineup. While Ms. Lopez accurately described defendant's shoulder-length hair, this appears to be the only accurate detail identified by the trial court. Significantly, Ms. Alvarez had a credible explanation of why she was unable to identify defendant from the photo lineup conducted by police two days after the incident, but immediately identified him upon seeing a picture on Facebook, namely because of the difference in his hair. She testified that had the officers

3. The relative strength of the reliability of the two eyewitnesses' identifications of defendant is significant because it explains why we hold that Ms. Alvarez's testimony was properly admitted and that any error in admitting Ms. Lopez's testimony was harmless.

shown her the picture she saw on Facebook, she would have been able to identify defendant as the shooter because in the Facebook picture he had his hair down similar to how it looked on the day of the murder. Accordingly, this factor somewhat undermines a finding of independent origin as to both witnesses, but with less force as to Ms. Alvarez.

Regarding the level of certainty, the trial court found and the evidence reflects that, at the time of the meeting with Iris Smith, Ms. Alvarez "recognized the photos as the two males as they looked at or around the time of the shooting." In particular and, in our view, most importantly as to this factor, the trial court found that both Lopez and Alvarez had seen the photos before and that Ms. Alvarez, upon seeing the photos on her own, independently recognized defendant as one of the two people involved in the shooting soon after the shooting had taken place. Ms. Alvarez testified that, upon seeing a photo of defendant on Facebook a week or two after the incident, which she had not been shown in the lineup, and which showed his hair in the way he was wearing it at the time of the shooting, she was sure that he was the person who shot Mr. Jones.

Ms. Lopez, however, did not recognize defendant as the shooter based either on the photos or on viewing the defendant as he exited the police car on 29 February 2016.[4] Therefore, while Alvarez identified defendant with a high degree of certainty, apparently based on her exposure to photographs between the time she spoke with police and the time she spoke to the District Attorney's office, Lopez did not identify defendant with any degree of certainty at the time of the confrontation. This factor supports a finding of independent origin as to the in-court identification by Alvarez, but undermines such a finding for the identification by Lopez.

Finally, as to the length of time between the crime and the confrontation, the trial court accurately found that approximately three and a half years passed between the shooting and the impermissibly suggestive events of 29 February 2016. However, only a week or two passed between the crime and Ms. Alvarez's identification of defendant from the Facebook picture. This factor undermines a finding of independent origin as to Ms. Lopez but not as to Ms. Alvarez, since Ms. Alvarez identified defendant shortly after the crime.

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4. While the trial court found that Ms. Lopez recognized Mr. Malone as he exited the police car, the Court of Appeals majority accurately noted that this finding was not supported by evidence.

Ultimately, weighing factors such as these is not an exercise employed with mathematical precision. Certain factors may be more important than others depending upon the nature of the impermissibly suggestive procedure as well as the particular facts of the case. "Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *State v. Pigott*, 320 N.C. at 99, 357 S.E.2d at 634 (citing *State v. Flowers*, 318 N.C. 208, 220, 347 S.E.2d 773, 781 (1986)). In this case, we conclude that in the totality of the circumstances, Ms. Alvarez's opportunity to view the crime, the degree of attention she paid to the suspects, the short period of time between the crime and her identifying defendant from an accurate picture, and the certainty of her identification outweigh her inaccurate initial description. Weighing against this the possible impact of the impermissibly suggestive procedures, the evidence demonstrates that for Ms. Alvarez, her identification was made long before seeing the video of defendant's interview with police or the pictures that Ms. Smith showed her, such that those procedures had no impact on her identification and did not create the risk of a misidentification.

According to the trial court's findings of fact, supported by the evidence adduced at the pretrial hearing, Ms. Alvarez's identification of defendant was based primarily upon the impression she formed after seeing a photograph of the defendant on a Facebook page, independent from any police- or prosecutor-led identification proceeding. She saw the photograph one or two weeks after the shooting and, at that time, was confident that defendant was the shooter. This fact, in conjunction with the factors discussed above, convinces us that the trial court correctly concluded that Ms. Alvarez's in-court identification had an origin that was independent of the impermissibly suggestive identification procedure conducted by the State. Assuming that the identification testimony of Ms. Lopez was improper because it lacked an independent origin, any failure to suppress it was not prejudicial because Ms. Alvarez's in-court identification was properly admitted. With one witness confidently identifying defendant as the shooter, we believe beyond any reasonable doubt that suppressing a second identification would not change the outcome here. *See* N.C.G.S. § 15A-1443(c) (providing that a violation of a defendant's federal constitutional rights is prejudicial unless harmless beyond a reasonable doubt).

II. EIRA Claim

In addition to the constitutional claim, there is also before us a statutory claim that the events of the 29 February 2016 meeting between eyewitnesses Lopez and Alvarez and Iris Smith violated the EIRA, which

defendant asserts in the alternative if we were to reverse the Court of Appeals on the due process claim and the State brings to us by way of a petition for discretionary review. The State contends that the EIRA explicitly only addresses the actions of law enforcement officers and therefore is inapplicable to this case because the allegedly impermissibly suggestive identification procedures here were carried out by an employee of the District Attorney's office. Because the Court of Appeals stated in dicta that the EIRA applies to all eyewitness identification procedures, the State argues this Court should clarify the law. Defendant urges us to take a more comprehensive view of the purpose of EIRA, and, to remand for consideration of defendant's EIRA claim if we do not affirm the majority on his constitutional claim. It is a question of first impression for this Court, but one that we do not need to address at this time because of our disposition of defendant's constitutional claim. Our holding here is that, while the identification procedures used by Ms. Smith in the days before trial were impermissibly suggestive, the relevant in-court identification was of independent origin and sufficiently reliable; thus, there is nothing further to be added by concluding that the EIRA does or does not apply.

Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals properly found that Ms. Alvarez and Ms. Lopez were subjected to witness identification procedures that were impermissibly suggestive, but erred in failing to recognize that the evidence demonstrates that Ms. Alvarez's identification was sufficiently of independent origin to negate a substantial likelihood of a misidentification.

AFFIRMED IN PART AND REVERSED IN PART.

Justice ERVIN, concurring in the result, in part, and dissenting, in part.

Although I concur in the Court's determinations that the trial court did not err by finding that Ms. Alvarez's identification of defendant as the perpetrator of the killing of Mr. Jones and the shooting of Mr. White had an origin independent of any impermissibly suggestive identification procedures to which she might have been subjected and that any error that the trial court might have committed in admitting the identification testimony of Ms. Lopez was harmless beyond a reasonable doubt given the admission of Ms. Alvarez's identification testimony, coupled with the existence of other evidence tending to show defendant's involvement in

the commission of the crimes that he was convicted of committing, I am unable to agree with the Court's decision to address the "impermissible suggestibility" issue and with aspects of the manner in which the Court has made its "impermissible suggestibility" and "independent origin" determinations. As a result, I concur in the result reached in the Court's opinion, in part, and dissent from the Court's opinion, in part.

In its opinion, the Court affirms the Court of Appeals' decision to overturn that portion of the trial court's order denying defendant's motion to suppress the identification testimony of Ms. Alvarez and Ms. Lopez based upon a determination that the identification procedures that led to the challenged identification testimony were "impermissibly suggestive." *State v. Fowler*, 353 N.C. 599, 617, 538 S.E.2d 684, 698 (2001) (citing *State v. Powell*, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988); *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984); *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978)). I am unable to join this portion of the Court's opinion for at least two reasons.

As an initial matter, while I share the Court's discomfort with certain of the events that occurred during the meeting that was held between Ms. Smith, Ms. Alvarez, and Ms. Lopez in the Alamance County Historic Courthouse, I do not believe that there is any need for the Court to address the issue of whether Ms. Alvarez was subjected to impermissibly subjective identification procedures during that meeting. In light of the Court's determination, in which I concur, that Ms. Alvarez's testimony identifying defendant as the person who killed Mr. Jones and wounded Mr. White had an origin that was independent of any impermissibly suggestive identification procedures to which she might have been subjected, any decision that we might make with respect to the issue of "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification," *id.*, would be of little more than academic interest. According to well-established North Carolina law, a reviewing court should "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). *See also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) (stating that "[c]ourts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue"). A witness's in-court identification testimony is admissible in the event of a finding "that the in-court identification has an origin independent of the invalid pretrial procedure" regardless of the extent, if any, to which the witness in question was subject to an impermissibly suggestive

identification procedure. *State v. Bundridge*, 294 N.C. 45, 46, 239 S.E.2d 811, 819 (1978) (citing *U.S. v. Wade*, 388 U.S. 218, 242, 87 S. Ct. 1926, 1940, 18 L. Ed 2d 1149, 1166 (1967); *State v. Henderson*, 285 N.C. 1, 12, 203 S.E.2d 10, 18 (1974)); *see also State v. Harris*, 308 N.C. 159, 166, 201 S.E.2d 91, 96 (1983) (holding that, "[e]ven assuming arguendo that the pretrial photographic lineup procedure could be found impermissibly suggestive, we find more than adequate evidence to support the trial court's decision to hold [the witness's] in-court identification admissible as being of independent origin"). Thus, given that we have decided that the trial court did not err by finding Ms. Alvarez's identification of defendant as a perpetrator of the crimes charged to be of "independent origin," I see no need to address the merits of defendant's contention that Ms. Alvarez had been subjected to impermissibly suggestive identification procedures and dissent from the Court's decision to do so.

Secondly, I have concerns about certain statements that the Court has made in addressing the "impermissible suggestibility" issue. According to the applicable standard of review, an appellate court reviewing a trial court order granting or denying a suppression motion "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which case they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citing *State v. Thompson*, 303 N.C. 169, 277 S.E.2d 413 (1981); *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966); 4 Strong's N.C. Index 3d § 175 (1976). In light of the applicable standard of review, I am concerned about the Court's statement that Ms. Smith "effectively told [Ms.] Lopez and [Ms.] Alvarez that they were viewing pictures of the men [that] police believed were responsible for the shooting." After carefully reviewing the trial court's findings, I am unable to find any support of this assertion. Similarly, without otherwise commenting upon the manner in which Ms. Smith conducted her meeting with Ms. Alvarez and Ms. Lopez, I am not certain that the trial court's findings fully support the Court's comment that, "for [Ms.] Lopez and [Ms.] Alvarez to be shown pictures and a videotaped interview, even for just a few minutes, of the person now on trial for murder goes far beyond the line where trial preparation ends and witness coaching begins." As a result, aside from my belief that the Court would be better advised to refrain from discussing the "impermissible suggestibility" issue at all, I am not persuaded that the analysis upon which my colleagues rely is fully consistent with the applicable standard of review.

Finally, while I agree with my colleagues that the trial court's findings support its conclusion that the identification testimony of Ms. Alvarez

had an origin independent of any impermissibly suggestive identification procedures to which she might have been subjected, I am concerned about the extent to which the Court's discussion of the "independent origin" issue relies upon an analysis of the testimony received at the suppression hearing rather than upon the findings of fact that the trial court made at the conclusion of that proceeding.[1] In addition, in light of the Court's decision to uphold the trial court's determination that the identification by Ms. Alvarez of defendant as the perpetrator of the crimes was of "independent origin" and the Court's related decision that the admission of Ms. Alvarez's identification testimony suffices to render any error that the trial court may have committed in admitting Ms. Lopez's identification testimony harmless beyond a reasonable doubt, I see no need to address the relative strength of the State's independent origin showing as between Ms. Alvarez and Ms. Lopez and do not believe that the relative strength of the identification testimony provided by the two witnesses sheds any light upon the non-prejudice analysis that we are called upon to conduct in this case.

All of that being said, however, I am fully satisfied that the trial court's findings of fact, which reflect a careful consideration of each of the factors that are relevant to the making of an "independent origin" determination, *Thompson*, 303 N.C. at 172, 277 S.E.2d at 434 (citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401, 411 (1971); *Headen*, 295 N.C. 437, 245 S.E.2d 706), support the trial court's determination that Ms. Alvarez's identification of defendant as the perpetrator of the crimes charged was of independent origin. Among other things, the trial court found that Ms. Alvarez was within four feet of the perpetrators at the time that the offense was committed; that the offenses were committed over a period of 75 to 90 seconds; that the shooting of Mr. Jackson and Mr. White was a "startling event" "that would claim your attention or cause you to pay no attention and flee from the situation"; that Ms. Alvarez was "paying close attention to the two males that came up and to Mr. Jones"; that Ms. Alvarez "gave a general description of clothing, hair and body piercing and the car"; that Ms. Alvarez recognized defendant as one of the perpetrators of the crimes charged when she saw an on-line photo of defendant; and that Ms. Alvarez appeared confident in the accuracy of her identification testimony. Thus, I concur in the Court's ultimate determination that the trial court did not err by

1. For example, the Court's discussion of the degree to which Ms. Alvarez and Ms. Lopez were paying attention at the time that they observed the killing of Mr. Jones and the shooting of Mr. White rests, to a considerable extent, upon an analysis of testimony admitted at the suppression hearing rather than the trial court's factual findings.

concluding that the testimony of Ms. Alvarez identifying defendant as one of the perpetrators of the killing of Mr. Jones and the shooting of Mr. White had an origin independent of any impermissibly suggestive identification procedures to which she had been subjected and that the admission of Ms. Alvarez's identification testimony, coupled with the other evidence tending to show defendant's involvement of the commission of the crimes charged, rendered any error that the trial court might have committed in admitting Ms. Lopez's identification testimony harmless beyond a reasonable doubt. As a result, for all of these reasons, I concur in the result reached in the Court's opinion in part, and dissent from the Court's opinion, in part.

Justices NEWBY and HUDSON join in this separate opinion.

STATE OF NORTH CAROLINA
v.
RONTEL VINCAE ROYSTER

No. 441A18

Filed 1 November 2019

1. Appeal and Error—preservation of issues—sufficiency of evidence—differing theories at trial and on appeal

The defendant in a cocaine trafficking prosecution preserved for appeal the issue of the sufficiency of evidence of possession where a black box that was later determined to contain cocaine was the basis of the charge. Defendant argued at trial that there was insufficient evidence both that he knew cocaine was in the box and that there was cocaine in the box at the time the box was in his possession.

2. Appeal and Error—evenly divided Supreme Court—Court of Appeals opinion stands without precedential value

A Court of Appeals decision that the State did not present sufficient evidence of possession of cocaine stood without precedential authority where the vote of the Supreme Court was evenly divided.

Justice DAVIS did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 822 S.E.2d 489 (N.C. Ct. App. 2018), vacating a judgment entered on 4 October 2016 by Judge James E. Hardin, Jr. in Superior Court, Alamance County. Heard in the Supreme Court on 30 September 2019.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant.

Jay H. Ferguson, Geeta N. Kapur, and James D. Williams, Jr., for defendant-appellee.

EARLS, Justice.

Defendant Rontel Vincae Royster was convicted by a jury on 30 September 2016 of trafficking in cocaine by possession pursuant to N.C.G.S. § 90-95(h)(3)(c). Here we consider whether defendant waived appellate review of his sufficiency of the evidence argument by failing to raise it in the trial court and whether the trial court erred in denying defendant's motion to dismiss on the basis of insufficient evidence. The Court of Appeals concluded that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine and vacated defendant's conviction. *State v. Royster*, 822 S.E.2d 489 (N.C. Ct. App. 2018). We conclude that defendant did not waive his sufficiency of the evidence argument by failing to raise it in the trial court. As to the issue of whether the State presented sufficient evidence that defendant possessed 400 grams or more of cocaine on the date in question, the members of this Court are equally divided; accordingly, the holding of the Court of Appeals with respect to this issue is left undisturbed and stands affirmed without precedential value.

I. Background

On 28 December 2013, at around 7:00 p.m., eighteen-year-old Humberto Anzaldo was visiting friends at the Otter Creek Mobile Home Park in Green Level, North Carolina, when he saw two acquaintances, Polo and Scrappy, having an argument. According to Anzaldo, Polo was "mad" and "was screaming and arguing at Scrappy about losing $150,000." Shortly thereafter, Anzaldo observed Polo, Scrappy, and another man, Hector Lopez, leave the mobile home park in a gray two-door BMW.

At approximately 8:30 p.m. that evening, defendant's father, Ronald Royster, was at his apartment in Burlington, North Carolina, when,

hearing a knock on his door, he opened it to find several men outside, one of whom he recognized. Upon entering the apartment, one of the men asked Mr. Royster whether he had spoken with defendant. According to Mr. Royster, after he responded that he had not spoken with defendant, the man stated, "[w]ell, if you haven't talked to your son, come on with us," and proceeded to point a gun at Mr. Royster's head and bind his hands with a cord. The men then walked Mr. Royster to a grey, two-door BMW, blindfolded him, and drove him to the Otter Creek Mobile Home Park. Upon arrival, Mr. Royster heard a phone being placed by his ear and recognized defendant's voice on the other end of the call. Mr. Royster told defendant, "I don't know what's going on; you need to come and talk to them."

The following morning, 29 December 2013, Anzaldo, having left the Otter Creek Mobile Home Park the previous evening not long after Polo and Scrappy departed, returned to the mobile home park at around 8:00 or 9:00 a.m. After ten or fifteen minutes, Anzaldo was walking toward his car to leave when he heard a whistle and saw Polo standing in front of a nearby mobile home. Anzaldo spoke with Polo and, through the door of the mobile home, saw Mr. Royster inside tied up with what appeared to be rope. According to Anzaldo, he told Polo "[y]ou can't be doing this; this ain't Mexico." Anzaldo was still speaking with Polo outside of the mobile home when a white Acura arrived at the mobile home park.

When defendant and another man, Demarcus Cates, got out of the Acura, Polo, Anzaldo, and Lopez went to meet them. Meanwhile, Scrappy led Mr. Royster, now untied and with his blindfold removed, out from behind the mobile home. Defendant told Mr. Royster to "get in the car" and Mr. Royster got in the back seat of the Acura. Defendant then handed Cates a black box, which was in turn passed to Polo, Scrappy, and Anzaldo, before being passed back to Scrappy. Anzaldo described the box as "pretty heavy" and testified that no one looked inside the box during the encounter and that he did not know what was in it.

Following this exchange, Cates and Polo began arguing and then started yelling and shoving each other. Anzaldo turned around to leave, at which point he heard approximately four or five gunshots and ran behind a nearby mobile home. Anzaldo saw Scrappy, still holding the black box, run into the woods. After defendant, Cates, and Mr. Royster drove away in the Acura, Anzaldo saw Polo lying dead on the ground. Polo had been shot four times, including multiple gunshot wounds to his head.[1]

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1. Cates was convicted of voluntary manslaughter in a separate trial in November 2013. *State v. Cates*, No. COA16-672, slip op. at 4, 2017 WL 1650090, at *1–2 (N.C. Ct. App.

At approximately 9:30 on the following morning, officers from Alamance County's K-9 unit performed a grid search for guns and drugs in the woods behind the mobile home park. Behind a tree located about fifty to seventy-five yards into the wooded area, officers discovered a black box containing a large amount of cocaine. Although there was heavy rain the previous evening, the box was completely dry. In the woods, about seventy-five yards away, officers also discovered a dry mason jar containing an additional amount of cocaine. Defendant presented evidence tending to show that the grid search was prompted by a police interview with Anzaldo on the morning of 30 December 2013, during which Anzaldo gave the "precise location[]" of the black box and stated that the box contained "two (2) kilos of cocaine."

On 6 July 2015, defendant was indicted pursuant to N.C.G.S. § 90-95(h)(3)(c) for trafficking in cocaine by possession of 400 grams or more on 29 December 2013. Defendant moved to dismiss the trafficking charge based on insufficient evidence. The trial court denied defendant's motion. At the close of all evidence, defendant renewed his motion to dismiss, which was again denied. After the jury returned a verdict of guilty, the trial court sentenced defendant to 175 to 222 months' imprisonment. Defendant appealed.

At the Court of Appeals, defendant argued that the trial court erred in denying his motion to dismiss the trafficking charge because the State failed to present sufficient evidence that he actually possessed cocaine on 29 December 2013. Specifically, he contended that the fact that the black box was found in the woods a day later with 400 grams or more of cocaine inside of it did not amount to substantial evidence that the box contained cocaine when defendant passed the box to Cates. The Court of Appeals majority agreed. The majority summarized the State's evidence regarding the exact contents of the black box on 29 December 2013 as follows:

> (1) the heated argument between Polo and Scrappy on the evening of 28 December 2013, (2) the kidnapping of defendant's father that same evening, (3) defendant's production of a closed black box in exchange for his father on the morning of 29 December 2013, and (4) the discovery of a black box containing at least 996 grams of cocaine in the woods on the morning of 30 December 2013.

May 2, 2017) (unpublished). However, a charge of trafficking in cocaine brought against Cates, based on the same black box at issue in this case, was dismissed at the close of the State's evidence on the grounds of insufficiency of the evidence. *Id.* at *1.

Royster, 822 S.E.2d at 492. The majority concluded that while "this sequence of events raises a suspicion as to the commission of the offense charged, we conclude that it is just that: a suspicion." *Id.* Accordingly, the majority held that the trial court erred in denying defendant's motion to dismiss. *Id.*

One member of the panel dissented for two separate reasons. *Id.* at 492–93 (Dillon, J., dissenting). First, the dissenting judge determined that defendant had failed to preserve his insufficiency of the evidence argument "because the ground for his argument on appeal [was] different [than] the ground he argued before the trial court." *Id.* at 493 (citation omitted). According to the dissenting judge, defendant's motion in the trial court was based solely on the element of knowledge—that is, whether "[d]efendant *knew* there was cocaine in the black box when he possessed it." *Id.* at 493 ("Felonious possession of a controlled substance has two essential elements. [1] The substance must be possessed and [2] the substance must be *knowingly* possessed." (quoting *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015))). Yet, defendant's argument on appeal, the dissenting judge concluded, was "whether there was sufficient evidence that cocaine was, in fact, in the box at the time [d]efendant possessed it." *Id.* Next, the dissenting judge determined that even assuming defendant had preserved his specific argument on appeal, the evidence was sufficient, when taken in the light most favorable to the State, for a reasonable juror to infer that there was cocaine in the black box at the time it was in defendant's possession. *Id.* at 493–94.

The State filed its appeal of right based on the dissent.

II. Analysis

A. Waiver

[1] The State first argues that defendant failed to preserve the issue of whether the State presented sufficient evidence of possession—that is, whether there was actually cocaine in the black box at the time the box was in defendant's possession. We disagree.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C. R. App. P. 10(a)(3); *see also State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (stating that, when ruling on a defendant's motion to dismiss for insufficient evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense

charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense" (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); and then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971))). Our rules provide that:

> A defendant may make a motion to dismiss . . . at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence.

N.C. R. App. P. 10(a)(3).

Here the State contends that while defendant moved to dismiss at the close of the State's evidence based on insufficiency of the evidence, and renewed his motion at the close of all evidence, he failed to preserve the specific argument he made on appeal by abandoning the sole ground he argued in the trial court—knowledge—and arguing a different, unpreserved ground on appeal—possession. In response, defendant argues that as long as a defendant makes an initial statement moving to dismiss for insufficient evidence, this constitutes a general motion to dismiss that requires the trial court to consider the sufficiency of the evidence with respect to every element of the offense charged and thereby preserves all elements as grounds for appellate review—even if the defendant proceeds to argue that the evidence is insufficient with respect only to certain elements.

We need not address here whether a defendant preserves appellate review of elements not specifically argued in the trial court because defendant, in addition to arguing that there was insufficient evidence that he knew cocaine was in the black box, also argued that there was insufficient evidence that cocaine was actually in the box at the time the box was in his possession. At the close of the State's evidence, defense counsel argued:

> The testimony has been that no one looked in that box at all and determined, at the time, the contents of that box. The evidence further is that this box was not found until the next day, some 18 or so hours or more, after the original activity.
>
> . . . .
>
> Along with that, by it not being found until 18 or so hours later, the last that we know it is in the possession of some individual by the name of Scrappy. We -- the

> State has not been able to produce any evidence of what occurred between the time that he took possession of the box and the time it was found the next morning in a totally different location.
>
> . . . . And we suggest to you, that based on the evidence before the Court at this point, that it is not substantial; there's not substantial evidence to show possession, knowing possession, by this Defendant, of any controlled substance in the box at the time of the alleged crime. So we'd ask you to allow our motion as to the cocaine.
>
> . . . .
>
> Now, the evidence from Mr. Anzaldo was that the -- at least on one occasion, that the box was not transferred until Ronald Royster came out of the [mobile home]. Ronald Royster hadn't seen a box, but, again, it could have been money. It could have been rocks; we don't know. We have no idea what was in that box at the time that it was transferred.

In the same vein, defense counsel argued at the close of all evidence:

> So we suggest to you that there is not sufficient evidence, not substantial evidence at this point, at the close of all the evidence, that our client had any knowledge of what was in that box; not only knowledge on his part, but, there is no evidence at all as to what was in the box on the 29th; none.

We conclude that defendant argued in the trial court that the State failed to present substantial evidence of actual possession and that this issue was properly preserved for appellate review.

B. Sufficiency of the Evidence

[2] Next, the State argues that the Court of Appeals erred in concluding that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013. As to this issue, the members of this Court are equally divided; accordingly, the holding of the Court of Appeals with respect to this issue is left undisturbed and stands affirmed without precedential value. *See, e.g.*, *Piro v. McKeever*, 369 N.C. 291, 794 S.E.2d 501 (2016) (per curiam); *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam).

III. Conclusion

In sum, we conclude that defendant preserved for appellate review the issue of insufficiency of the evidence. The holding of the Court of Appeals that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013 is affirmed without precedential value.

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

CHRISTOPER DICESARE, JAMES LITTLE, AND DIANA STONE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED	)	
v.	)	From Mecklenburg County
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY	)	

No. 156A17-2

ORDER

Defendant-Appellee's 1 July 2019 petition for writ of certiorari is hereby allowed.

The parties are instructed to file supplemental briefs to address the issue set forth in Defendant-Appellee's petition for writ of certiorari. Defendant-Appellee shall have up to and including 2 December 2019 to file its brief. Plaintiff-Appellants shall have thirty days from the date of service of Defendant-Appellee's brief in which to file a response brief. Any reply brief shall be filed within ten days of the date of service of Plaintiff-Appellants' response brief.

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

GLOBAL TEXTILE ALLIANCE, INC.	)	
	)	
v.	)	From Guilford County
	)	
TDI WORLDWIDE, LLC, ET AL.	)	

No. 279A19

ORDER

The Court, acting on its own motion and for the purpose of resolving the issues raised by Plaintiff-Appellant's 22 August 2019 filings, orders as follows:

1. The Court elects to treat Plaintiff-Appellant's petition for writ of certiorari filed on 22 August 2019 as a motion to amend the record on appeal. We hereby allow this motion for the limited purpose of including two of Plaintiff-Appellant's proposed additions to the record: 1) Steven Graven's Second BCR 10.9 letter (July 18, 2018); and 2) Discovery Status Conference Hearing Transcript dated July 24, 2018 held before the Honorable Gregory P. McGuire.

2. All of the other issues presented by Plaintiff-Appellant in its 22 August 2019 petition for writ of certiorari are denied.

3. Plaintiff-Appellant's Motion to Include in the Record on Appeal the Transcript from 2 July 2019 Hearing to Settle Record on Appeal filed on 22 August 2019 is denied.

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

GYGER v. CLEMENT

[373 N.C. 167 (2019)]

EVE GYGER	)	
	)	
v.	)	From Guilford County
	)	
QUINTIN CLEMENT	)	

No. 31PA19

ORDER

The petition for discretionary review is allowed for the purpose of addressing the following issue: "Whether N.C.G.S. § 52C-3-315(b) (2017), which allows affidavits to be admitted into 'evidence if given under penalty of perjury' requires affidavits to be notarized."

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ONSLOW COUNTY
	)	
ANTWAUN KYRAL SIMS	)	

No. 297PA18

ORDER

Defendant's motion for appropriate relief in this matter is remanded to the Superior Court in Onslow County for an evidentiary hearing pursuant to N.C.G.S. § 15A-1418(b)–(c). Accordingly, the time periods for perfecting or proceeding with the appeal are tolled, and the order of the trial division with regard to the motion must be transmitted to the appellate division so that the appeal can proceed or an appropriate order terminating it can be entered. Additionally, defendant's resentencing appeal is hereby held in abeyance, until further order of this Court.

By order of this Court in Conference, this 17th day of October, 2019.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of October, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. STRUDWICK

[373 N.C. 169 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	MECKLENBURG COUNTY
	)	
TENEDRICK STRUDWICK	)	

No. 334P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By Order of this Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

4P16-3	State v. Jamonte Dion Baker	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP15-765; COAP17-657) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused** **Davis, J., recused**
22P19-4	State v. Jennifer Jimenez/April Myers	Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture	Dismissed
29P19	State v. John Edward Heelan	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1245)	Denied **Davis, J., recused**
31P19	Eve Gyger v. Quintin Clement	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-244)	Special Order
34P19	Kyle Busch Motorsports, Inc. v. Justin Boston, Individually and Justin Boston Racing, LLC	Defs' Petition for Writ of Certiorari to Review Decision of the COA (COA18-426)	Denied
46P18-2	State v. Richard Thomas Mays	Def's Pro Se Motion for PDR (COAP18-45)	Dismissed
51PA19	Ted P. Chappell and Sarah S. Chappell v. North Carolina Department of Transportation	Amicus Curiae's (Owners' Counsel of America) Motion for Permission to Participate in Oral Argument (COA19-71)	Denied
62P13-2	State v. Ronnie Perry	Def's Pro Se Petition for Writ of Mandamus (COAP18-410)	Dismissed **Ervin, J., recused**
79PA18	State v. Kenneth Vernon Golder	State's Motion to File Amended New Brief for the State (Appellant) (COA16-987)	Allowed **10/17/2019**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

87P19	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Crystal Hamner Cox, Joseph Cain Pickard, and Jessica Littlefield	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-225) 2. Plt's Motion for Leave to Withdraw PDR	1. --- 2. Allowed
91P14-6	State v. Salim Abdu Gould	1. Def's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA18-425) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion for Notice of Appeal 4. Def's Pro Se Motion for Habeas Corpus Arbitration-Mediation 5. Def's Pro Se Petition for Writ of Mandamus 6. Def's Pro Se Motion for Jurisdictional Hearing and to Issue Transport Order 7. Def's Pro Se Motion for Averment of Jurisdiction - *Quo Warranto* 8. Def's Pro Se Motion for Subpoena *Duces Tecum*	1. Dismissed *ex mero motu* 2. Allowed 3. Denied 4. Denied **07/24/2019** 5. Denied **09/23/2019** 6. Denied **09/23/2019** 7. Denied 8. Denied **Davis, J., recused**
115A04-3	State v. Scott David Allen	1. Def's Motion for Extension of Time to File Appellant Brief 2. Def's Motion to Allow Withdrawal of Margaret C. Lumsden as Counsel 3. Def's Motion for Office of Indigent Defense Services to Appoint New Co-Counsel	1. Allowed **10/07/2019** 2. Allowed **10/09/2019** 3. Allowed **10/09/2019**
121P19	State v. Jerry Lewis Oglesby	Def's PDR Under N.C.G.S. § 7A-31 (COA18-277)	Denied
124P10-2	State v. Michael Raymond Hawkins	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davidson County (COA09-821; COAP19-40) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
130P18-2	State v. James Maurice Wilson	Def's Pro Se Motion for PDR (COA17-917)	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

131P16-14	State v. Somchai Noonsab	1. Def's Pro Se Motion for Verified Complaint (COAP16-103) 2. Def's Pro Se Motion to Discharge-Vacate Conviction-Sentence and Set at Liberty	1. Denied **10/02/2019** 2. Denied **10/02/2019**
156A17-2	DiCesare, et al. v. the Charlotte-Mecklenburg Hospital Authority	1. Def's Petition for Writ of Certiorari to Review Order of N.C. Business Court 2. Plts' Motion for Kathleen Konopka to Withdraw as Counsel	1. Special Order 2. Allowed
156P19	Steven A. Eisenbrown, and Wife, Marcia Jo M. Eisenbrown, as Co-Trustees of the Steven A. Eisenbrown Trust Dated 10/05/07; Lou C. Self, Trustee of the Martha B. Cecil Generation Skipping Trust Dated 1/19/98 f/b/o Lou C. Self, a 1/4th Undivided Interest; Martha C. Jones, Trustee of the Martha B. Cecil Generation Skipping Trust Dated 1/19/98 f/b/o Martha C. Jones, a 3/4th Undivided Interest; Bruce M. Doolittle, and Wife, Cynthia A. Doolittle; David Michael Kohler and Wife, Sharlene Ann Kyser-Kohler; and Nancy Anderson (f.k.a. Nancy Finkell) v. Town of Lake Lure, and Lake Lure Lodge, LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-934)	Denied **Davis, J., recused**
168A19	Cardiorentis AG v. Iqvia Ltd. and Iqvia RDS, Inc.	1. Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 2. Plt's Motion to Admit Catherine E. Stetson, Pro Hac Vice 3. Plt's Motion to Admit Kyle Druding, Pro Hac Vice 4. Def's Motion to Supplement Record on Appeal	1. 2. Allowed **06/25/2019** 3. Allowed **06/25/2019** 4. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

173P19	Aesthetic Facial & Ocular Plastic Surgery Center, P.A. v. Renzo A. Zaldivar and Oculofacial Plastic Surgery Consultants, P.A. Surgical, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-431)	Denied **Davis, J., recused**
174P19	In the Matter of N.T., R.T., A.T., E.T., H.T., D.T., T.T., Jr., G.T., and M.T.	1. Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31; (COA18-849; 18-996) 2. Guardian ad Litem's Motion to Amend Response to PDR	1. Denied 2. Allowed **05/23/2019**
175P19	Erie Insurance Exchange, Plaintiff v. Jackson R. Davies; William R. Davies; Brooke I. Davies; Donna Gardner, Administrator of the Estate of Cory R. Reese, Deceased, Defendants v. Donna Gardner, as Administrator of the Estate of Cory R. Reese, Deceased Third-Party Plaintiff v. USAA General Indemnity Company, Third-Party Defendant	Def's (Donna Gardner) Petition for Writ of Certiorari to Review Order of the COA (COA18-1092)	Denied
187P18-2	State v. Edward Smith, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Gaston County (COA17-925) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

188A18-2	Banyan GW, LLC v. Wayne Preparatory Academy Charter School, Inc. and Its Board of Directors; Sharon Thompson, Chair of the Board of Directors; and John Ankeney and Lucius J. Stanley, as Members of the Board of Directors, and Vertex III, LLC	1. Def's (Wayne Preparatory Academy Charter School, Inc.) Notice of Appeal Based Upon a Dissent (COA18-378) 2. Def's (Wayne Preparatory Academy Charter School, Inc.) PDR as to Additional Issues	1. --- 2. Allowed **Davis, J., recused**
191P19	John F. Stowers and Wife, Susan Edward Stowers v. Michael J. Parker, Julie A. Parker, and Parker and Parker, a General Partnership	Plts' PDR Under N.C.G.S. 7A-31 (COA18-737)	Denied
193P18-5	State v. Joshua Bolen	1. Def's Pro Se Motion for Appropriate Relief (COAP18-238) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Dismissed without prejudice **09/25/2019** **Davis, J., recused**
203P19-2	State v. Frederick Lynn Ingram	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Orange County (COAP19-333) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
209P19	State v. Elbert Justin Horton	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Pasquotank County (COAP18-312) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
211P19	State v. Harold Lee Pless, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA17-1270)	Denied **Davis, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

30 OCTOBER 2019

221A19	State v. Anton Thurman McAllister	1. Def's Notice of Appeal Based Upon a Dissent (COA18-726) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
236P19	State v. Julien Antonio Allen	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA18-1159) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
248P19	State v. Tamora C. Williams	1. Def's Motion for Temporary Stay (COA18-994) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/2019** Dissolved **10/30/2019** 2. Denied 3. Denied
249P19	Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-253) 2. Plt's Motion to Amend Its 25 June 2019 PDR	1. Allowed 2. Denied
254P19	State v. Stacy DeWhite Brown	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-401)	Denied **10/07/2019**
263P19	State v. Harold Lee Pless, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA18-21)	Denied
267P19	Winston Affordable Housing, L.L.C., d/b/a Winston Summit Apartments v. Deborah Roberts	1. Def's Motion for Temporary Stay (COA18-553) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion for Clarification as to Effect of 9 July 2019 Order Allowing the Motion for Temporary Stay 4. Plt's Motion for Reconsideration, Vacation, or Modification of Order 5. Def's PDR Under N.C.G.S. § 7A-31 6. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/08/2019** 2. Allowed 3. Special Order **07/10/2019** 4. Special Order **07/10/2019** 5. Allowed 6. Allowed **Davis, J., recused**

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279A19	Global Textile Alliance, Inc. v. TDI Worldwide, LLC, et al.	1. Plt's Motion to Include in the Record on Appeal the Transcript from 2 July 2019 Hearing to Settle Record on Appeal 2. Plt's Petition for Writ of Certiorari to Review Order of Business Court 3. Defs' Motion for Extension of Time to Respond to Petition for Writ of Certiorari	1. Special Order 2. Special Order 3. Allowed **08/26/2019**
288P19	In the Matter of L.B., C.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA18-815)	Denied
290PA15-2	State v. Jeffrey Tryon Collington	Def's Pro Se Motion to Make Appearance at Oral Argument (COA14-1244)	Dismissed **10/16/2019**
297PA18	State v. Antwaun Sims	Def's Pro Se Motion to Attend Oral Argument (COA17-45)	Dismissed **10/03/2019**
297PA18	State v. Antwaun Sims	Def's Motion for Appropriate Relief	Special Order **10/17/2019**
302P19	State v. Benjamin Curtis Lankford	Def's PDR Under N.C.G.S. § 7A-31 (COA18-854)	Denied
307P19	State v. Jordan Andrew Jones	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COAP19-273) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
317P16-4	State v. Ronald Thompson Corbett	Def's Pro Se Motion to Appeal (COA18-327)	Dismissed **Davis, J., recused**
320P19	State v. Mario Donye Gullette	Def's Pro Se PDR (COA19-43)	Denied **Davis, J., recused**
324A19	State v. Jack Howard Hollars	1. State's Motion for Temporary Stay (COA18-932) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion for Extension of Time to File Response to PDR	1. Allowed **08/21/2019** 2. Allowed **10/04/2019** 3. --- 4. Denied 5. Allowed **09/19/2019**

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325P19	Paula Saunders v. Hull Property Group, LLC and Blue Ridge Mall, LLC	1. Plt's PDR Prior to a Determination of the COA (COA19-728)	1. Denied
		2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as moot
		3. North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief	3. Dismissed as moot
		4. North Carolina Association of Defense Attorneys' Conditional Motion to File Amicus Brief	4. Dismissed as moot
328P19	Cathy Anne Carswell Reis, et al. v. Barbara Anthony Carswell, et al.	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1039)	1. Denied
		2. Plt's Pro Se Motion to Withdraw Opinion	2. Denied
		3. Plt's Pro Se Motion for Temporary Stay	3. Denied **08/29/2019**
		4. Plt's Pro Se Petition for Writ of Supersedeas	4. Denied
		5. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question	5. Dismissed *ex mero motu*
333P19-2	Sunaina S. Glaize v. Samuel G. Glaize	1. Plt's Pro Se Motion to Vacate and Set Aside 29 August 2019 Order (COA19-612)	1. Denied
		2. Plt's Pro Se Motion for Leave to Amend Plt's 25 August 2019 Petition for Writ of Certiorari, Petition for Writ of Mandamus, Petition for Writ of Supersedeas, Petition for Writ of Prohibition	2. Denied
		3. Plt's Pro Se Motion to Disqualify Clerk, Daniel M. Horne	3. Denied
334P19	State v. Tenedrick Strudwick	1. State's Motion for Temporary Stay (COA18-794)	1. Allowed **08/26/2019** Dissolved **10/30/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's Motion to Correct Technical Error	3. Dismissed as moot
		4. State's PDR Under N.C.G.S. § 7A-31	4. Special Order
335A19	In the Matter of S.K.G.B.	Respondent-Mother's Motion to Dismiss Appeal	Allowed **10/01/2019**

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338P19	State v. Eldridge Edger Hodge	1. Def's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COAP19-323) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
341P19	State v. Christopher O'Neal Patterson	Def's Pro Se Motion for PDR (COAP19-485)	Dismissed
342P19	Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown, and Paul Kearney, Sr. v. Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in His Official Capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in His Official Capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in His Official Capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; the State of North Carolina; and the North Carolina State Board of Elections	1. Defs' Motion to Admit David H. Thompson Pro Hac Vice (COA19-762) 2. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 3. Defs' Motion to Admit Haley N. Proctor Pro Hac Vice 4. Defs' Motion to Admit Nicole Frazer Reaves Pro Hac Vice	1. Dismissed as moot **09/25/2019** 2. Dismissed as moot **09/27/2019** 3. Dismissed as moot **09/27/2019** 4. Dismissed as moot **09/27/2019**

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343A19	In the Matter of J.D.	1. State's Motion for Temporary Stay (COA18-1036) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **09/05/2019** 2. Allowed **09/25/2019** 3. --- **09/25/2019** 4. Allowed
345P18-2	State v. Mark Leon Conner	Def's Pro Se Petition for Writ of Habeas Corpus (COA17-1293)	Dismissed **10/08/2019**
350P19	State v. Samantha Meiaza Matthews	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1257) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. 2. Allowed **10/15/2019** 3.
355P19	State v. Kenneth Brewer	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1246) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied 2. Denied **09/10/2019**
365A19	In the Matter of K.L.M., K.A.M., and K.L.M.	Respondent-Father's Motion to Amend Record on Appeal	Allowed **10/14/2019**
367P19	State v. Maceo Lamont Gardner	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-145) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
370P19	State v. Binyam T. Gebrehiwot	Def's Pro Se Motion for Jurisdiction as Resident of United States	Dismissed
373P19	State v. William Allan Miles	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1274) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. 2. Denied 10/02/2019 3.
377P19	State v. Dmarlo Levonne Faulk Johnson	1. Def's Pro Se Motion for PDR (COA19-191) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **10/04/2019** 2. Denied **10/04/2019**

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381P19	In the Matter of C.N., A.N.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA18-1031) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **10/02/2019**
385P19	Raleigh Housing Authority v. Patricia Winston	1. Def's Motion for Temporary Stay (COA18-1155) 2. Def's Petition for Writ of Supersedeas	1. Allowed **10/04/2019** 2. **Davis, J., recused**
388P19	Tori J. Neal v. Erik A. Hooks, et al.	1. Petitioner's Pro Se Motion for PDR (COAP18-164) 2. Petitioner's Pro Se Verified Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot
395PA19	In the Matter of J.S., C.S., D.R.S., D.S.	1. Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Wilkes County 2. Respondent-Mother's Motion for Transcription of Hearing 3. Respondent-Mother's Motion for Extension of Time to Settle Final Record	1. Allowed **10/28/2019** 2. Allowed **10/28/2019** 3. Allowed **10/28/2019**
406PA18	State v. Cory Dion Bennett	1. Amicus Curiae's Motion to Admit Robert S. Chang Pro Hac Vice (COA17-1027) 2. Amicus Curiae's Motion to Admit Taki V. Flevaris Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit Robert S. Chang Pro Hac Vice 4. Amicus Curiae's Amended Motion to Admit Taki Flevaris Pro Hac Vice	1. Dismissed as moot **10/25/2019** 2. Dismissed as moot **10/25/2019** 3. Allowed **10/25/2019** 4. Allowed **10/25/2019**
407P13-5	State v. Shawn Germaine Fraley	1. Def's Pro Se Motion for PDR (COA13-69; COAP14-509; COAP17-44) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

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407A19	Crescent University City Venture, LLC v. Trussway Manufacturing, Inc. and Trussway Manufacturing, LLC	1. Defs' Motion to Admit Michael A. Harris Pro Hac Vice 2. Defs' Motion to Admit Martyn B. Hill Pro Hac Vice	1. Allowed **10/24/2019** 2. Allowed **10/24/2019**
411P19	State v. Joshua Wayne Clemons	Def's Petition for Writ of Mandamus (COA18-469)	Denied **10/30/2019** **Davis, J., recused**
437PA18	Chavez, et al. v. Carmichael	1. Amicus Curiae's (United States of America) Motion for Reconsideration Regarding Leave to Participate in Oral Argument 2. Amicus Curiae's (American Civil Liberties Union Foundation, The American Civil Liberties Union of North Carolina Legal Foundation, et al.) Motion for Permission to Participate in Oral Argument	1. Denied **10/30/2019** 2. Denied **10/30/2019**
441A18	State v. Rontel Vincae Royster	Def's Motion to Take Judicial Notice of Filings in this Court (COA18-2)	1. Dismissed as moot **10/30/2019** **Davis, J., recused**
441A18	State v. Rontel Vincae Royster	Def's Motion to Amend Appellee Brief (COA18-2)	Allowed **10/30/2019** **Davis, J., recused**
504P04-4	State v. Marion Beasley, Sr.	Def's Pro Se Motion for Memorandum of Error (COA00-927; COA07-1157; COAP19-167)	Dismissed
638P02-4	State v. Carl Douglas St. John	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Caldwell County (COAP06-220) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Hudson, J., recused** **Ervin, J., recused**

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